88-971 (1)

ORAL ARGUMENT REQUESTED

Supreme Court, U.S.
FILED
MAY 2 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

No.

IN RE: BERNARD J. DOLENZ

Petitioner,

PETITION FOR A WRIT OF MANDAMUS, OR A WRIT OF PROHIBITION, OR BOTH REGARDING JURISDICTION

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Bernard J. Dolenz, files this, his Petition for a Writ of Mandamus, or a Writ of Prohibition, or both, to the Honorable William J. Zloch, Judge of the United States District Court, Southern District of Florida, directing nullification of a Final Judgment entered on February 16, 1988 (42), and for cause, Petitioner shows as follows:

NATURE OF THE SUIT AND PROCEEDINGS

The Defendant was arrested on July 10, 1986 for non-payment of services which the owner contends were either not done, were done poorly, or excessivly charged. The owner attacks jurisdiction of the Trial Court as the boat was never finished or commissioned according to statements given by the Plaintiff's owner, his marine expert surveyor, and

the U.S. Marshall in his return of service (p. 52 et seq). Accordingly, all proceedings and judgment should be void as the Court lacks jurisdiction.

REASONS FOR ALLOWANCE OF WRIT

This is an appropriate case as this Court has power to issue all writs under 28 USC, Section 1651, and Article III of the U.S. Constitution in that, a) Exceptional circumstances warrant the excercise of this Courts discretionary power as this boat has been placed "in ransom" for the past two years, the owner of the boat has been refused the right to defend the vessel, and the Zloch Court has even refused any hearing by the Petitioner, even though the Court has documents reflecting the ownership in the Petitioner (18, 30, 52, et seq).

b) Adequate relief was not obtained from the 11th Circuit (30, 31, 34).

c) Continuing delays in the Court system

causes deterioration of the vessel and deprives the Petitioner of his property interest to get the Defendant finished and into the water.

ISSUES PRESENTED

This Petition presents the following issues elaborated at (73 et seq):

1. TO RESTRICT THE LOWER COURT TO AUTHORIZED EXERCISE OF JURISDICTION.

2. TO COMPEL LOWER COURT TO EXERCISE ITS AUTHORITY WHEN THERE IS A DUTY TO DO SO.

3. TO COMPEL LOWER COURT'S COMPLIANCE WITH PRIOR MANDATES.

WHEREFORE, Petitioner prays: That a Writ of Mandamus or a Writ of Prohibition be issued by this Court directed to the Honorable William J. Zloch to dismiss the case as the Court lacks jurisdiction; that the Defendant be released to Petitioner without impediment for its placement into the water; for Rule 11 Sanctions against the Plaintiff; and for general relief.

4-19-88 Bernard Alby

CERTIFICATE OF SERVICE

Three copies of the foregoing instrument were sent by regular mail to Judge William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd, Ft. Lauderdale, FL 33301 and to Steven Perry, Plaintiff's attorney, P. O. Drawer 24, Stuart, FL 33497-0024 on this the _____ day of April, 1988.

Bernard J. Dolenz

(2)

88-971

SUPPLEMENT REQUESTED

FILED

MAY 2 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

No.

IN RE: BERNARD J. DOLENZ

Petitioner,

APPENDIX

PETITION FOR A WRIT OF MANDAMUS,
OR A WRIT OF PROHIBITION, OR BOTH
REGARDING JURISDICTION

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

45 pp

APPENDIX

Page	Instrument	Date
	PER THE CLERK'S CONVERSATION REGARDING TYPE SIZE, THIS IS THE APPENDIX IN PERTINENT PART FROM THE REDUCTIONS OF THE ORIGINAL INSTRUMENTS.	
	Prayer	
18	Claim of Bernard J. Dolenz	04/03/87
30	Order: Deny Writ of Mandamus	10/21/87
31	Motion to Rehear Mandamus	10/26/87
34	Order: Deny Motion to Rehear Mandamus	01/27/88
35	Order: Deny Motion for Hearing RE: Jurisdiction	02/11/88
36	Order: Deny Motion for Hearing	02/15/88
42	Final Judgment	02/16/88
73	Petition for Writ of Prohibition and/or Writ of Mandamus	10/01/87

PRAYER

Petitioner prays of this Honorable United States Supreme Court that:

1. A Writ of Mandamus or a Writ of Prohibition be issued by this Court directed to the Honorable William J. Zloch to dismiss the case as the Court lacks jurisdiction;

2. The Eleventh Circuit Appeals Court ruling on the Motion for Re-Hearing on Petition for Writ of Prohibition and/or Writ of Mandamus be corrected affirmatively for the owner of the Defendant vessel;

3. The Defendant vessel be released to the Petitioner without impediment for its placement into the water;

4. For Rule 11 Sanctions against the Plaintiff;

5. For General Relief.

(CAPTION)-U.S. DISTRICT COURT

CLAIM OF BERNARD J. DOLENZ

COMES NOW, BERNARD J. DOLENZ, and presents his claim as follows:

1. BERNARD J. DOLENZ is the owner of the seized property identified as the "ARIES STARTREK, ENROLLMENT NO. 555798, TOGETHER WITH ALL TACKLE AND APPAREL", of said vessel. On March 14, 1987, an agent of Melissa Keyes gave an oral assignment of the above seized property to Bernard J. Dolenz in Dallas, TX which was ratified subsequently by Melissa Keyes, said assignment being notorized March 23, 1987, and being delivered in Dallas, TX on March 26, 1987 to Bernard J. Dolenz.

2. BERNARD J. DOLENZ is the owner of the aformentioned vessel and any of its

tackle, apparel, appurtenances and other equipment in the possession of the Plaintiff, both at the shipyard at 450 Southwest Salerno Road, Stuart, Florida, 33494, the Mini Bay Use Storage, at 1105 N.E. Industrial Boulevard, Jensen Beach, Florida, storage bin no. 199 and any other location to which any of the appurtencances, tackle and other equipment at whatever location said equipment has been removed and placed.

3. BERNARD J. DOLENZ, as the owner of the "ARIES STARTREK" and its tackle, appurtenances, apparel and equipment demands its restitution and the right to defend this action.

_____

Bernard J. Dolenz

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-5862

IN RE:

BERNARD J. DOLENZ,

Petitioner.

(Filed October 21, 1987 in the U.S. Court of Appeals, Eleventh Circuit by Miguel J. Cortez - Clerk).

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before HILL and FAY, Circuit Judges.

The Petition for Writ of Mandamus is denied.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5862

IN RE:

BERNARD J. DOLENZ,

Petitioner.

MOTION FOR REHEARING ON

PETITION FOR WRIT OF PROHIBITION AND/OR

WRIT OF MANDAMUS

TO THE HONORABLE JUSTICES OF SAID COURT:

1. Petitioner, Bernard J. Dolenz, moves for a Rehearing on the Petition for Writ of Prohibition and/or Writ of Mandamus, and would show as grounds as follows:

2. Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal, FLOTA MARITIMA

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BROWNING DE CUBA, SOCIADAD ANONINA V. SNOBL, 363 F2d 733 (CA4 Md, 1966), cert, den. 385 US 837, 87 S. Ct. 82, 17 L Ed 2d 71, and when raised must be examined and decided, ARMSTRONG CORK CO. V. FARRELL LINE, INC., 81 F. Supp 848, (DC Pa, 1948).

3. The Zloch Court has no jurisdiction, and if so has never ruled on it, and for what reasons. There is no underpinning of a Maritime contract as the vessel has never been finished or commissioned, as admitted by the Plaintiff.

4. The U.S. Marshall of the same Court in his Process Service of July 10, 1986 states: "ARRESTED THE ABOVE OCEAN GOING CATAMARAN C SEE ATTACHED INVENTORY. VESSEL IS INCOMPLETE, UNDER CONSTRUCTION, AND EMPTY OF EQUIPMENT" (Emp. added). See Exhibit "A".

5. Mandamus is appropriate to restrict the lower court to authorized exercise of jurisdiction, KERR V. U.S. DIST. COURT FOR

NORTHERN DIST., 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed 2d 725 (1976) and to compel the lower court to exercise its authority when there is a duty to do so, EX PARTE BURTIS, 103 U.S. 238, 26 L. Ed 392 (1881). Mandamus is also appropriate to compel the lower court's compliance with prior mandates. This vessel is unfinished, and services on an unfinished vessel do not provide a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1). BOND V. F/V MERMAID, 311 F. Supp 1013, DC Fla. 1970.

WHEREFORE PREMISES CONSIDERED, Petitioner requests this Court to reconsider and rehear this Petition, and render an opinion that this case is without jurisdiction, and should be dismissed in the United States District Court for the Southern District of Florida.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

A copy of the foregoing instrument was sent this 26th day of October 1987 to William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd., Fort Lauderdale, FL 33301, and to Steven Perry, P. O. Drawer 24, Stuart, FL 33497-0024.

Bernard J. Dolenz

(PERTINENT PART OF U.S. MARSHALLS RETURN)

Name and title of individual served:

BURDICK

Date of Service
7/10/86

Time of Service
6:00 p.m.

Signature of U.S.
Marshall
S/S
Randolf Fuedeal
(sp)

REMARKS: 7/10/86 ARRESTED THE ABOVE OCEAN GOING CATAMARAN (SEE ATTACHED INVENTORY). VESSEL IS INCOMPLETE, UNDER CONSTRUCTION AND EMPTY OF EQUIPMENT.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-5862

(Filed January 27, 1988 in the U.S. Court of Appeals, Eleventh Circuit by Miguel J. Cortez - Clerk).

IN RE: BERNARD J. DOLENZ, Petitioner.

On Petition for Writ of Mandamus or Prohibition to the United States District Court for the Southern District of Florida

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Before HILL and FAY, Circuit Judges. BY THE COURT:

Petitioner's "Motion for Rehearing", construed as a Motion to Reconsider this Court's Order of October 21, 1987, is DENIED.

Petitioner's Motion to Expedite is DENIED AS MOOT.

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.
a Florida corporation,

Plaintiff,

v. ORDER

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.

THIS MATTER is before the Court upon the Motion for Hearing Regarding Jurisdiction (DE 47) filed herein by Bernard J. Dolenz. The Court has carefully considered the merits of said Motion, has carefully reviewed the court file and after due consideration, it is

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ORDERED AND ADJUDGED that the Motion For Hearing Regarding Jurisdiction (DE 47) filed herein by Bernard J. Dolenz be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 11th day of February, 1988.

_____

William J. Zloch
U.S. District Judge

Copies furnished:
Bernard J. Dolenz
Steven Perry, Esquire

(Filed February 11, 1988 with Robert M. March - Clerk U.S. District Court).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.
a Florida Corporation,

Plaintiff,

v. ORDER

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.

THIS MATTER is before the Court upon the Motion For Hearing (DE 44) filed herein by Bernard J. Dolenz, and the Court having carefully considered the merits of said Motion, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Motion For

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Hearing (DE 44) filed by Bernard J. Dolenz be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 15th day of January, 1988.

William J. Zloch
U.S. Dist. Judge

Copies furnished:

Steven L. Perry, Esq.

Bernard J. Dolenz, J.D., M.D.
6102 Swiss Avenue
Dallas, TX 75214

(Filed January 15, 1988 with Robert M. March - Clerk U.S. District Court).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.
a Florida Corporation,

Plaintiff,

v. FINAL JUDGMENT

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.

THIS MATTER was tried before the court, without a Jury, on March 16, 1987.

In addition, presently before the court is a Motion For The Award of Costs And Attorneys' Fees (DE 33) filed herein by the Plaintiff, Stuart Yacht Builders, Inc. Present for the bench trial on March 16, 1987 were counsel for the Plaintiff and Ms. Melissa Keyes. Ms. Keyes had filed a

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Claim (DE 13) claiming that she was the owner of the seized property. The Claim bore Ms. Keyes signature, was notorized and "sworn to".

Prior to the commencement of trial, Ms. Keyes stated in open court that she had transferred all of her ownership interest in the Defendant vessel to Mr. Bernard Dolenz on March 15, 1987. Ms. Keyes handed up to the Court a copy of the written "Assignment" dated March 15, 1987. She further stated that she had no further interest in said vessel. These representations were not disputed by her lawyer and indeed, formed the basis for the ore tenus Motion To Withdraw as counsel for Ms. Keyes and the Defendant vessel made by the law firm of Roberts & Reynolds in open court. This Court is its Order (DE 24) dated March 19, 1987, granted the ore tenus Motion to Withdraw. As is reflected in this Court's prior

Order (DE 24), at no time was Mr. Bernard Dolenz present in court and at no time did any individual appear on his behalf. Ms. Keyes stated that she was not authorized to represent Mr. Dolenz or to speak on his behalf but that she had spoken with him over the course of the previous weekend and that Mr. Dolenz was aware of the date of trial and "hoped" for a continuance. At no time prior to trial did Mr. Dolenz or any representative of Mr. Dolenz request a continuance of the trial of this matter.

Ms. Keyes further advised the Court that Mr. Dolenz had not and did not wish to retain Ms. Keyes' counsel of record to represent the Defendant vessel in the above-styled cause. Ms. Keyes further stated to the Court that Mr. Dolenz would represent himself. Additionally, Ms. Keyes stated that she discharged the law firm of Roberts & Reynolds and Mr. Lyman

Reynolds, Jr., Esquire, her counsel of record from any further representation of her and the Defendant vessel in this cause.

This Court is not asked to pass upon the validity of the hand-written "Assignment" and no comment is made by the Court on that issue. However, assuming arguendo that the "Assignment" is valid, this Court notes that Bernard Dolenz had notice of this bench trial and for whatever reasons chose not to appear. Assuming arguendo that the "Assignment" is not valid, then Ms. Keyes was present and in court during the entire bench trial and for whatever reasons chose to discharge her lawyer and further chose not to proceed in the matter or to put on any testimony or evidence in support of her claim.

Accordingly, the Court proceeded with the bench trial of this cause, there being no good and sufficient reason to continue

same.

The Plaintiff presented documentary evidence and testimony through witnesses, Mr. Gregory Burdick and Mr. Raymond Seese. Subsequent to the bench trial, counsel for the Plaintiff filed Motion For The Award Of Costs And Attorney's Fees (DE 33), attaching to said motion as Exhibit "A" an itemization of all time spent and the charges for same; Exhibit "B", which is a supporting Affidavit for attorney's fees; Exhibit "C", an Affidavit with respect to time spent by counsel for the Plaintiff; and Exhibit "D" which is an Affidavit of Costs.

At the conclusion of the Plaintiff's case and after the Plaintiff rested, the Court called the case of the Defendant or any claimant. There was no response and no individual appeared in the courtroom on behalf of the Defendant and, although present in the courtroom during the ENTIRE

proceeding, Ms. Keyes did not come forward and put on any testimony or evidence.

The Court notes that Bernard J. Dolenz represents himself to be a lawyer in the State of Texas as well as a medical doctor.

Based on the testimony presented by the Plaintiff, the documentary evidence received by the Court, and the Court having reviewed the court file makes the following findings of Fact and Conclusions of Law. To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such. Conversely, to the extent that any of the following Conclusions of Law constitute Findings of Fact, they are adopted as such.

FINDINGS OF FACT

1. Pursuant to the testimony at trial, the documentary evidence and the Claim (DE 13) filed by Melissa Keyes, the Court

finds that Melissa Keyes at all times material was the owner of the vessel, Aries Startrek, and that all necessaries provided said vessel were ordered by the owner or the owner's authorized agent.

2. Stuart Yacht Builders and Melissa Keyes entered into an agreement to perform services on the vessel Aries Startrek on July 1, 1985. (Plaintiff's Exhibit No. 3).

3. Stuart Yacht Builders agreed to dry dock the "Aries" at the rate of $216.00/month from 11/01/85 to 12/02/86 and $432.00/month thereafter. (Plaintiff's Composite Exhibit No. 6).

4. The services were performed to return the vessel to proper navigational condition.

5. The services were performed in a workmanlike fashion and the time expended was reasonable.

6. All unpaid sums accrued interest at

the rate of 18% per annum. (Plaintiff's Exhibit Nos. 3, Composite 6, and 19).

7. On July 3, 1986 process of warrant for arrest of the "Aries" its tackle and apparel, was issued.

8. On July 10, 1986 process was served on the vessel and its tackle by the U.S. Marchal and custody relinquished to Greg Burdick as Court Appointed Substitute Guardian.

9. As substitute custodian, Stuart yacht Builders provided maintenance, storage, security and bookkeeping services for the "Aries".

10. In accordance with the work authorization, Stuart Yacht Builders provided Ship Repair Liability Insurance for the "Aries". (Plaintiff's Exhibit Nos. 3 and Composite 6).

11. In accordance with the work authorization, Stuart Yacht Builders provided Hull Liability Insurance for the

"Aries". (Plaintiff's Exhibit Nos. 3, Composite 6 and 19).

12. In accordance with this Court's Order of July 3, 1986 appointing Stuart Yacht Builders Substitute Custodian, Hull Liability Insurance was provided for the "Aries". (Plaintiff's Exhibit Nos. Composite 6 and 19).

13. As Substitute Custodian, Stuart Yacht Builders paid all storage charges for the warehouse containing the "Aries" tackle and apparel. (Plaintiff's Exhibit Nos. Composite 6 and 19).

14. The "Aries Startrek" is a vessel within the meaning of 46 U.S.C. Section 971.

15. No testimony or physical or documentary evidence was presented by the Defendant or any Claimant.

16. The Court finds that the following costs incurred by the Plaintiff, through its attorney are authorized by law:

Clerk, U. S. District Court - Filing custodial bond	$ 500.00
U.S. Marshal Arrest vessel	1,000.00
Marshal's Insurance/fees	1,000.00
Stuart News Notice of Publication	22.10
TOTAL	$2,522.10

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. Section 1333.

2. This is an Admiralty and Maritime Claim within the meaning of Rule 9(h).

3. The Plaintiff is a corporation doing business in the Southern District of Florida.

4. The vessel subject to this action is within the jurisdiction of this court and the Court has jurisdiction over same.

5. The "Aries Startrek" is a vessel within the meaning of 46 U.S.C. Section 971.

6. The services, repairs, drydock and necessaries furnished by the Plaintiff are within the scopy of 46 U.S.C. Section 971.

7. The services, repairs, drydock and necessaries were furnished by the Plaintiff upon the authority of a person within the scope of 46 U.S.C. Section 972.

8. A rebuttable presumption of a maritime lien is created by the furnishing of necessareies ordered by the owner or the owner's authorized agent. BELCHER OIL COMPANY V. M/V GARDENIA, 766 F2d 1508 (11th Cir. 1985); 46 U.S.C. Section 971.

9. The Defendant and the owner (Claimant) have not overcome the rebuttable presumption of a maritime lien and have failed to satisfy their burden of proof in establishing that the providing of the necessaries was not authorized to bind the vessel or the owner.

10. The Plaintiff is entitled to a maritime lien pursuant to 46 U.S.C.

Section 971 and to a judgment foreclosing the lien.

11. The Plaintiff is entitled to recover reasonable CUSTODIA LEGIS expenses.

12. Absent some statutory aughorization, the prevailing party in an admiralty case is not generally entitled to an award of attorneys' fees. NORITAKE CO., INC. V. M/V HELLENIC CHAMPTION, 627 F. 2d 724 (5th Cir. 1980). Therefore, no attorneys' fees will be awarded to the Plaintiff in this matter.

Accordingly, it is

ADJUDGED that the Plaintiff, Stuart Yacht Builders, Inc., a Florida corporation, shall recover against the Defendant, Aries Startrek, Enrollment No. 555798, together With All Tackle And Apparel, the following sums:

a. Sales tax with interest due through 3/16/87 $1,719.61

b. Repair insurance with interest due

through 3/16/87 477.87

c. Hull insurance with interest due through 3/16/87 3,904.83

d. "Mini Bay" storage with interest due through 3/16/87 882.67

e. Storage charges with interest due through 3/16/87 7,085.72

f. Labor and material with interest due through 3/16/87 22,307.08

g. Additional costs incurred as Substitute Custodian

(i) routine maintenance 952.00

(ii) bookkeeping expenses 420.00

h. Court costs 2,522.10

TOTAL DUE THROUGH TRIAL-3/16/87 $38,899.88

IT IS FURTHER ADJUDGED that prior to the time set for sale below, the vessel may be redeemed by paying a total of the sums due to the Plaintiff, together with interest at a rate of twleve (12%) percent per annum and all costs of this action accruing subsequent to this Judgment. If

the Plaintiff is not paid prior to the time set for the sale, then the Marshal of This Court shall sell the vessel on the _____ day of _____, 1988 at _____ o'clock ___.m. to the highest bidder for cash, except as set forth hereinafter.

Prior to the above-referenced sale date, the Marshal shall have filed with This Court and provided a copy to counsel of record, proof of compliance with Local Rule 4 regarding publication of the Notice of Sale. Upon holding the sale, a single Certificate of Sale, Certificate of Title and Certificate of Disbursement shall be filed as to the vessel sold and the proceeds of the sale shall be applied to the Judgment of Record and to satisfy any costs incurred by the Plaintiff subsequent to the Judgment. In the event that there is an excess above and beyond the Judgment and costs, this amount shall be placed in the registry of the Court to be disbursed

upon the application of the individuals claiming to be the owners of the vessel at the time this Judgment was entered.

IT IS FURTHER ADJUDGED that the Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if the Plaintiff is not the purchaser of the vessel. If the Plaintiff is not the purchaser of the vessel, the clerk shall credit the Plaintiff's bid with the total sums due pursuant to the Judgment together with interest and any costs incurred subsequent to judment.

On the filing of the Certificate of title, all named Defendants to this action and all persons claiming under or against those Defendants since the filing of the original Proof of Publication in this action shall be foreclosed of all claims and interest in the vessel the "Aries Startrek" as fully described in the Certificate of Title, and the purchaser at

the sale shall be let in possession of the vessel.

IT IS FURTHER ADGUDGED that jurisdiction of this action is retained for the purpose of entering such further Orders as may be necessary and proper including with limitation writs of possession.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 16th day of February, 1988.

William J. Zloch
U.S. District Judge

Copies furnished:

Steven Perry, Esquire

Melissa Keyes
c/o Turks Island Divers
Hotel Kittina
P. O. Box 42, Grand Turk
Turks and Caicos, British West Indies

or

P. O. Box 281

Deltaville, Virginia 23043

or

816 Southeast Ninth Street

Deerfield Beach, Florida 33441

or

Box 266781, West Oakland Park Blvd.

Fort Lauderdale, Florida 33311

U.S. Marshals Service

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

BERNARD J. DOLENZ,

Petitioner,

V. NO. 87-5862

HONORABLE WILLIAM J. ZLOCH, JUDGE OF THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA,

Respondent.

PETITION FOR WRIT OF PROHIBITION AND/OR WRIT OF MANDAMUS

The above named petitioner, Bernard Dolenz, herein applies, pursuant to Section 1651, Title 28, United Stated Code, and Rule 21 (a) of the Federal Rules of Appellate Procedure, for a writ of mandamus or, in the alternative, for a writ of prohibition, directed to the above

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named respondent, the Honorable William J. Zloch, Judge of the U.S. District Court, Southern District of Florida. In support of this application petitioner states:

ORDER AND OPINION BELOW

On September 25, 1987, Respondent made and entered an order denying the Motion for intervention, the Motion to Dismiss because of lack of jurisdiction, the Motion to Reconsider, and Motion for Rule 11 Sanctions. A copy of the Order is attached as Exhibit "A".

STATEMENT OF FACTS

The facts necessary to an understanding of the issues presented by this application are as follows:

1. Melissa Keyes entered into an agreement with Plaintiff Stuart Yacht Builders, Inc. to do some design, engineering, exploratory carpentary, and replacement of inappropriate gear boxes and propellers among other things

(H9-H14) on an unfinished and uncommissioned "vessel". Ray Seese, Marine Surveyer for the Plaintiff admits that the vessel has never been completely finished or commissioned (G4), and the owner of Stuart Yacht likewise made similar statements (G6).

2. The work was not done satisfactorily (J14-J17) with exorbitant charges, which was controverted and not paid, about which Plaintiff sued in Admiralty in rem, even though the Plaintiff knew that the boat was never commissioned or finished.

3. While the suit was pending, Melissa Keyes transferred and assigned the Defendant "vessel", AIRES STARTREK to Bernard Dolenz, notarizing same March 23, 1987 and delivering same to Dolenz in Dallas, Texas on March 26, 1987. (I). The Notice of Motion for Intervention was sent March 18 (J19), being sent with supporting documents by Express Mail (J1).

A Claim of ownership was sent April 3 (H17).

4. Several requests were made of the Court to dismiss this case because of lack of jurisdiction beginning March 18 (J), April 4 (H), April 18 (G), with repeated requests of the Court's clerk and secretary to set a hearing because of deterioration and irrepairable harm befalling the vessel because of its exposure to the sun and warping due to inaction (C & B).

5. Efforts to resolve the matter amicably were resistd by the Plaintiff; even after pointing out the jurusdiction issue, the Plaintiff and his attorney persisted in the prosecution in Federal Court. Accordingly, Rule 11 Sanctions were requested of the Court under the circumstances. (D,E,F). The Court gave no hearing regarding the Rule 11 Motion for Sanctions. The court has not rendered

a final judgment.

STATEMENT OF ISSUES

The issues involved are:

1. TO RESTRICT THE LOWER COURT TO AUTHORIZED EXERCISE OR JURISDICTION.

Here the Petitioner feels strongly that the Zloch Court does not have jurisdiction as there is no underpinning of a Maritime contract since the "vessel" has never been finished or commissioned as the Plaintiff readily admits.

The Supreme Court has expressly recognized that the writ is an appropriate remedy to restrict a lower court to a proper exercise of its prescribed jurisdiction. KERR V. U.S. DIST. COURT FOR NORTHERN DIST. (1976) 426 U.S. 394, 48 L. E. 2d 725, 96 S.Ct. 2119.

In EX PARTE REPUBLIC OF PERU (1943), 318 U.S. 578, 87 L Ed 1014, 63 S. Ct. 793, where the Supreme Court dealt with a motion for leave to file a petition for a

writ of mandamus restraining a judge of a Federal District Court from the further exercise of unauthorized admiralty jurisdiction over a vessel, the court stated that insofar as the purpose of a writ of mandamus directed by an appellate court to an inferior court is to exert revisory appellate power over the inferior court, the writ affords an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction.

2. TO COMPEL LOWER COURT TO EXERCISE ITS AUTHORITY WHEN THERE IS A DUTY TO DO SO.

In EX PARTE BURTIS (1881), 103 U.S. 238, 26 L. Ed 392, the court stated the "elementary"rule that the writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, as regarded such rule as fully applicable in the determination of whether mandamus is available to control

the conduct of a lower federal court in a civil action.

KERR and EX PARTE PERU, supra, also elaborate on this premise.

3. TO COMPEL LOWER COURT'S COMPLIANCE WITH PRIOR MANDATES.

Where a lower Court has failed to comply with the Supreme Court's or other Appellate Court's prior mandate in a case, the writ of mandamus is an appropriate remedy to compel such compliance. PERKINS V. FOURNIQUET (1853) 55 U.S. 328, 14 L. Ed 441; BALTIMORE & O.R. CO. V. U.S., (1929) 279 U.S. 781, 73 L Ed 954, 49 S. Ct. 492. Here services on an unfinished vessel do not provide a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1). BOND B. F/V MERMAID (1970, DC Fla), 311 F. Supp 1013.

REASONS WHY WRIT SHOULD ISSUE

1. This Court has jurisdiction to issue the Extraordinary Writs prayed for by

virtue of the "All Writs Statute," 28 USC Section 1651.

2. The damage to the Petitioner and the "vessel" is real and immediate as it is deteriorating and warping as it is not receiving even maintenance care to its planks and engines which need periodic start up.

3. The delay involved, even by an expedited appeal herein, is not warranted under the circumstances, and will result in additional irrepairable injury to Petitioner if it is required to wait for normal appellate review.

4. The Order has so far departed from the accepted and proper course of judicial proceedings as to call fo an exercise of this court's exercise of supervision, particularly in view of the continuing damages being sustained.

STATEMENT OF RELIEF SOUGHT

The relief sought by Petitioner herein is

as follows:

1. Petitioner askes this Court to prohibit respondent and the other judges and officers of that court from further exercise of jurisdiction over a proceeding in rem pending in that court against Petitioner's unfinished and noncommissioned vessel, ARIES STARTREK, and to direct the district judge to enter an order in the proceeding declaring the vessel is immune from suit in Admiralty as there is no jurisdictional basis.

2. That Rule 11 Sanctions be imposed upon the Plaintiff for wrongful arrest and attorney's fees expended in defending a case, which Plaintiff and his attorney knew was without jurisdiction or merit in Admiralty.

EXHIBITS

EXHIBITS "A" through "J" with subparts are incorporated by reference herein, and have been alluded to in the Statement of Facts

and are available for a better understanding of the matters set forth in this petition.

WHEREFORE, Petitioner respectfully prays that a writ of mandamus or, in the alternative, a writ of prohibition, be issued by this court directed to respondent, the Honorable William J. Zloch, Judge of the U.S. District Court for the Southern District of Florida as prayed for in the Statement of Relief Sought, and for such other and further relief as the Court may deem proper.

Dated this 1st day of October, 1987.

Respectfully submitted,

Bernard J. Dolenz

CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 1st day of October, 1987 to William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd, Fort Lauderdale, FL 33301 by Express Mail; and by regular mail to Stephen Perry, P. O. Drawer 24, Stuart, FL 33497-0024.

MARINE SPECIALIST
Ray Seese
40 SW Hideaway Place
Stuart, FL 33497
Consulting

SURVEY REPORT

SUMMARY:

...This vessel ...has never been completely finished or commissioned...] Modifications to the vessel are being considered...The vessel has no standing or running rigging...The work to complete and commission this vessel is being done by Stuart Yacht Builders of Stuart, Flroida. It is recommended that when the vessel is completed a survey to update these findings and a sea trial be conducted.

(Statements of Plaintiff's expert)

One of world's largest catamarans is in Stuart

• From page A1

purchased it.

The family worked on the boat for several years, doing the electric work, installing two 453 GM Diesels, and completing much of the finish work, said Burdick.

Burdick estimates the boat is about 70 percent completed.

But for personal reasons the couple was unable to finish the job and two years ago they moved out of the state, leaving the Aries moored in a small creek of the South Fork.

The fiberglass-sheathed, double-planked mahogany construction is still perfect, said Burdick, and if the sale and survey goes well, it's the plan of the new owners to completely redo the boat and turn it into the show piece it was meant to be.

A lot of redesigning is planned.

Originally the boat was built for

ORAL ARGUMENT REQUESTED

Supreme Court, U.S.
FILED
DEC 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE (3)

Supreme Court of the United States

No. 88-971

IN RE: BERNARD J. DOLENZ

Petitioner,

Supplement

~~MOTION TO [illegible] TIME~~

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

SUP

TO THE JUSTICES OF THE UNITED STATES SUPREME COURT;

Petitioner, Bernard Dolenz files this, his Motion for Extention of Time, and for cause would show as follows:

1. A Petition for a Writ of Mandamus or a Writ of Prohibition was docketed in this Court on May 2, 1988 as No. 88-971.

2. While the Trial Court denied the Motion for Hearing Regarding Jurisdiction 2/11/88, sending notice, the clerk did not send any notice regarding a Judgment being docketed 2/22/88. The clerk did not send notice regarding this notice per FRCP 77(d) even though she had assured the Petitioner that she would keep the owner posted following several phone calls and trips regarding this case. Inquiry on

4/6/88 revealed that a judgment had been entered. A Motion to Extend Time for Appeal was sent 4/7/88 pursuant to FRAP 4(a) and case law dealing with Rule 77(d) and 60(b) before the 60 days would run. A Notice to Appeal was filed 4/14/88. The Trial Court judge denied the Motion to Extend Time to Appeal 4/22/88.

3. The Petitioner contends that Judge Zloch abused his discretion in not granting the Motion to Extend Time to Appeal even though the Notice of Appeal was filed more than 30 days after entry of final judgment because of the circumstances that impact upon Rules 77(d) and 60 (b) and the 11th Circuits December 1987 case, TESSMER V. WALKER, 833 F2d 935. The Petitioner contends that he followed WALKER as he did everything reasonable under the

circumstances to kept informed short of groveling and living at the Ft. Lauderdale Federal Courthouse. The clerk indicated she would keep me posted as I had made a nuisance by making several phone calls and visits to review the file.

4. Judge Zloch would never give a hearing thoughout all of this paper work; denied Motions for a hearing even. I have never seen Judge Zloch; never talked with him. I have an audience with the Pope in May; but I cannot get an audience with the Court in Fort Lauderdale even though I am the owner of the defendant vessel, which the Court knows though sworn testimony of the previous owner and by my statement of claim of ownership.

5. A check for $45,995.78 was tendered

to the clerk to have the vessel released 6/30/88 pursuant to Rule 4 (4)(f). Earlier repeated requests for the judgment payoff amounts from clerk and U.S. Marshall remained unanswered.

6. Because repeated calls to the Clerk regarding the release of the vessel since money had been tendered and calls to Judge Zloch's chambers resulted in no action or order, a FRAP 8 Motion was requested of the 11th Circuit 7/14/88. To date, neither Judge Zloch nor the 11th Circuit will give a release of the vessel; nor can I obtain information for its release. In the meantime, the vessel is deteriorating, which had been called to the Zloch Court and 11th Circuit's attention.

7. The 11th Circuit has refused to render a decision on the jurisdictiional

issue of whether or not the Trial Court ever had jurisdiction. Both Courts have been showed three distinct documents showing the defendant vessel is incomplete, under construction, and empty of equipment: U.S. Marshall's arrest statement of 7/10/86; statement of Marine Surveyor (Plaintiff's expert) that the vessel has never been completely finished or commissiioned; the Plaintiff's owner, who is quoted in newspaper articles that the boat is about 70% complete.

The 11th Circuit ruled that the Notice of the Appeal was untimely, which the Petitioner feels is in error, and which he makes this motion to extend time to appeal the 11th Circuit's ruling in the event the pending writ is denied.
The Petition for Rehearing was denied 9/29/88.

8.The Petitioner requests 60 days after a final order is issued regarding the Writ to perfect his Petition for Certiorari if the Writ for Mandamus or Prohibition or both is ruled unfavorably.

PRAYER

The Petitioner Prays this Court make a determination that the Trial Court lacks jurisdicition and that this case be dismissed for the reasons given in the Writ of Mandamus/Prohibition; that if the Writ is denied, this Motion to Extend Time be granted for 60 days following a ruling from this Court to perfect a Petition for Writ of Certiorari, and for General Relief.

Respectfully

12-26-88

CERTIFICATE OF SERVICE

Three copies of the foregoing instrument were sent by regular mail to Judge William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd., Fort Lauderdale, FL 33301 and to Steven Perry, Plaintiff's Attorney, P. O. Drawer 24, Stuart, FL 33497-0024 on this the 27th day of December, 1988.

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 88-971

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In re: BERNARD J. DOLENZ, Petitioner

RESPONSE TO PETITION FOR A WRIT OF PROHIBITION, WRIT OF MANDAMUS, OR BOTH

BERNARD J. DOLENZ
6102 Swiss Avenue
Dallas, Texas 75214
(214) 821-0220

Petitioner, Pro Se

STEVEN L. PERRY
555 Colorado Avenue
Stuart, Florida 34995
(407) 287-2600

Counsel for Respondent

January 25, 1989

22 pp

PREFACE

Respondents were not served with a Petition for Prohibition or Mandamus which is in content or form in accordance with Rule 27 or Rule 33 of this Court. Respondents therefore set forth the following.

QUESTION PRESENTED

1. Will a Writ of Prohibition or Mandamus issue to restrict a District Court in the exercise of its admiralty jurisdiction where the district court's jurisdiction is predicated on a finding of fact.

LIST OF PARTIES

The parties to the proceedings below were the vessel "Aries Startrek", enrollment No. 555798 and the respondent herein, Stuart Yacht Builders, Inc. Melissa Keyes filed a claim in accord with Supplemental Rule C(6). The case was tried before the Honorable William J. Zloch, also a respondent herein.

The petitioner, Bernard Dolenz, filed no pleadings in the district court until subsequent to the trial of this cause. He has not intervened, nor has he filed an appearance as attorney on behalf of the vessel "Aries Startrek."

Although Bernard Dolenz has represented to this court that he is appearing pro se the interest represented is that of the Defendant vessel, "Aries Startrek."

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No. 88-971

IN THE SUPREME COURT OF THE UNITED STATES

In re BERNARD J. DOLENZ, Petitioner

RESPONSE TO PETITION FOR A WRIT OF PROHIBITION, WRIT OF MANDAMUS, OR BOTH

The respondents, Stuart Yacht Builders, Inc., and William J. Zloch respectfully pray that the requested Writs of Prohibition or Mandamus not issue and that the Petition of Bernard J. Dolenz be denied.

OPINIONS BELOW

The Final Judgment of the district court for the southern district of Florida has not been reported. A reprint of this opinion is attached in the Appendix hereto at page 1.

The order of the District Court for the Southern District of Florida denying the motions of Bernard Dolenz to dismiss, for intervention, and for reconsideration has not been published. A reprint is attached in the Appendix hereto at page 17.

The order of the district court for the Southern District of Florida Denying Petitioner's Motion for Substitution has not been reported. A reprint is attached in the Appendix hereto at page 19.

The decision of The Eleventh Circuit dismissing the appeal of Bernard J. Dolenz has not been reported. A reprint is attached in the Appendix hereto at page 26.

The decision of the Eleventh Circuit

Court of Appeals denying the Petition for Prohibition or Mandamus of Bernard J. Dolenz has not been reported. A reprint of the order is attached in the Appendix hereto at page 28.

JURISDICTION

The respondent invoked the jurisdiction of the District Court for the Southern District of Florida pursuant to 28 U.S.C. §1333 and 46 U.S.C. §971.

This case was tried to the court on March 16, 1987. The district court entered a final judgment on February 16, 1988.

Petitioner herein, Bernard J. Dolenz, filed a Motion to Dismiss and sought to intervene in the case on March 18, 1987. The district court denied the motion for intervention and the motion to dismiss on September 25, 1987.

The petitioner filed a Motion to Substitute Parties on 31 March, 1988. This motion was denied April 22, 1988.

The petitioner herein filed a Notice of Appeal in The Eleventh Circuit on April 14, 1988. A Motion for Extension of Time in which to file the appeal was denied by the district court on April 22, 1988. The appeal was dismissed on August 11, 1988, for lack of jurisdiction. The Petitioner's Motion for Rehearing was denied by the Eleventh Circuit on September 29, 1988.

A Petition for Writ of Prohibition or Writ of Mandamus was filed by the Petitioner Bernard J. Dolenz on October 1, 1987. This petition was denied by the Eleventh Circuit on October 21, 1987. The Petitioner sought reconsideration of the denial of mandamus. This Motion was denied on January 27, 1988.

The petitioner herein seeks to invoke the jurisdiction of this court pursuant to 28

U.S.C. §1651(a) for the review of some or all of the above stated orders.

STATUTES INVOLVED

28 U.S.C. §1333.Admiralty, Maritime and Prize Cases

> The district court shall have original jurisdiction, exclusive of the courts of the states, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. §971. Persons entitled to lien

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

STATEMENT OF FACTS

The respondent herein, Stuart Yacht Builders, Inc. filed an In Rem claim against

the vessel "Aries Startrek" in the District Court for the Southern District of Florida. The vessel was seized by the United States Marshal on July 10, 1986, and the respondent was designated as substitute custodian for the vessel.

The claim of Melissa Keyes as the owner of the vessel was served together with her answer and affirmative defenses on August 4, 1986.

The case was tried to The Honorable William Zloch on March 16, 1987.

The court called the case on the morning of March 16, 1987. At that time the court was advised by counsel for Melissa Keyes and by Melissa Keyes that she had transferred her ownership interest in the vessel to Bernard J. Dolenz on the preceding day. Melissa Keyes further advised the court that she had no authority to represent the new owner Bernard J. Dolenz; that her legal counsel Lyman Reynolds had no authority to

represent the owner; that neither she nor her legal counsel had the authority to represent the defendant vessel and specifically that she had no authority to request a continuance on behalf of the owner, Bernard J. Dolenz.

The court made further inquiry of Melissa Keyes and determined that Bernard J. Dolenz had been a partner in the vessel for some months preceding the date of trial. That Bernard J. Dolenz was an attorney authorized to practice in the State of Texas and was aware that the trial of this cause was to occur on March 16th in the District Court for the Southern District of Florida. The court noted that no communication had been received by Bernard Dolenz either through the mails, through any private delivery service, or by telephone.

The court accepted evidence in the form of documents and testimony presented by the plaintiff. The court then called the

defendants case to which no one responded although Melissa Keyes was present in the courtroom at that time.

Bernard Dolenz two days following trial filed a Motion to Dismiss for lack of jurisdiction and a Motion to Intervene. The court after consideration denied all motions and entered a final judgment in this cause which was docketed on February 22, 1988.

The petitioner, Bernard J. Dolenz filed a Notice of Appeal with The Eleventh Circuit which appeal was dismissed for lack of jurisdiction because the notice was untimely filed. Petitioner herein filed a notice for reconsideration of the Eleventh Circuit's dismissal which was denied on September 29, 1988. Petitioner Bernard J. Dolenz filed a Petition for Writ of Mandamus and/or Prohibition in The Eleventh Circuit Court of Appeals on October 1, 1987, which was denied on October 21, 1987.

The grounds upon which petitioner asserts that the district court lacks jurisdiction are that the vessel is not navigable, or is not complete, or is a "dead ship" and therefore not within the jurisdictional scope of 28 U.S.C. §1333 and 46 U.S.C. §971.

The District Court found specifically that the Defendant "Aries Startrek" was a vessel within the meaning of 46 U.S.C. §971.

REASONS FOR NOT GRANTING THE WRITS

The petitioner, Bernard Dolenz seeks to have this Court determine the status of the defendant vessel "Aries Startrek." The status of the "Aries Startrek" as a "vessel" within the meaning of 28 U.S.C. §1333 and 46 U.S.C. §971 is central to the district court's jurisdiction to enforce a maritime lien. The determination of a "vessel's" status necessarily involves questions of fact to be determined by the district court upon the evidence presented to it. The

petitioner contends that the "Aries Startrek" was (1) a vessel removed from navigation, i.e. a "dead ship", or (2) that the labor and materials for which respondent claims its lien were for construction of a new vessel rather than repairs.

The history of the "dead ship" doctrine is too lengthy to be set out herein. It should suffice to say that a vessel removed from navigation with no intent to return it to navigation is not a "vessel" subject to admiralty jurisdiction. The principal determination to be made by the district court in applying the "dead ship" doctrine is one of intent to return the vessel to navigation. Hercules Company v. The Brigadier General Absolom, 214 F.2d 66, (3rd Cir. 1954); Pleason v. Gulfport Shipbuilding, 221 F.2d 621, (5th Cir. 1955); Grauwiller Transportation v. King, 131 F. Supp. 630 (Dist. Crt. E. D. NY 1955)

The finding of intent required for the application of the "dead Ship" doctrine is a finding of fact properly to be made, in this instance, by the district court upon the evidence submitted to it. The petitioner before this court seeks to collaterally attack the findings of fact made by the district court in determining that it possessed the jurisdiction to enforce a maritime lien against the vessel "Aries Startrek."

This court has previously held that where the jurisdiction of a district court is predicated on a finding of fact neither mandamus nor prohibition will issue. In re Muir. "The Gleneden", 254 U.S. 522; 41 S. Ct. 185 (1921).

The facts in The Gleneden are analogous to those here. "The Gleneden" was arrested in rem, in admiralty in the District Court for the District of New Jersey. The "Gleneden" asserted as defense to the suit

that the vessel was immune from the issuance of process in admiralty because it was a vessel of the British Government. A hearing was held on the merits of this claim at which time the "Gleneden" was called upon to produce evidence to support the allegation of immunity. The vessel failed to produce such proof and the District Court determined the vessel to be subject to process in admiralty.

This court in discussing the case stated that the district court had prima facia jurisdiction of the suit and of the vessel and that the burden of showing otherwise was upon the party challenging such jurisdiction.

> From all that has been said it is apparent that the status of the Gleneden, judged in the light of what was done and shown in the district court, is at best doubtful and uncertain, both as matter of fact and in point of law. The jurisdiction of that court is correspondingly in doubt, for it turns on the status of the vessel.

The Gleneden, 41 S. Ct. 185, 188 (U.S. 1921).

The court held that the determination of the status of a vessel and the consequent determination of jurisdiction was not the proper subject for a writ of prohibition or mandamus.

A Writ of Prohibition issues as a matter of right only where lack of jurisdiction is plain. Where jurisdiction is debatable and requires a determination of status, prohibition and mandamus are inappropriate remedies. In re: Hussein Lutfi Bey, 256 U.S. 616; 41 S. Ct. 609 (1921).

In a case which is the converse of that before this court petitioner sought mandamus to have the District court vacate its order of dismissal and reinstate the cause. This court in addressing the issue stated: "This is, in effect, asking us to direct the District court to decide in a particular way the matter heard before it, which is never

the office of a mandamus." (citations omitted) Morrison v. District Court, 147 U.S. 14, 26; 13 S. Ct. 246, 250 (1893).

The petitioner herein argues alternatively that if the "Aries Startrek" was not a "dead ship" that the contract under which the labor and materials were supplied was one for the construction of a vessel rather than repairs. Again, petitioner requests that this court make a factual determination regarding the status of the "Aries Startrek" as a collateral attack upon the jurisdiction of the District court. If the contract in question was one for the construction of a new vessel rather than repairs the District court would lack jurisdiction to enforce maritime lien pursuant to 46 U.S.C. §971.
The Francis McDonald, 254 U.S. 240; 41 S. Ct. 65 (1920).

The petitioner failed to appear at the trial of this cause and present any evidence.

The owner of record, Melissa Keyes, although present during the trial failed to present any evidence. The trial court had before it the master carpenter Certificate of Completion dated December 31, 1968, reflecting that the vessel was built and completed in Tai Pai, Taiwan, The Republic of China in that year. (Appendix at page 29). Additionally the District court had before it the consolidated Certificate of Enrollment and Yacht License for the "Aries Startrek" reflecting that the vessel was built and completed in 1968. The Aries Startrek was documented in Miami, Florida in 1973. (Appendix at page 30).

The arguments previously made relative to the "dead ship" doctrine and the propriety of a Writ of Mandamus or Prohibition to attack the jurisdiction of the District court are equally applicable to this argument of the petitioner.

In addition it may be noted that when the "Aries Startrek" was launched in 1968 it became a vessel for purposes of maritime jurisdiction and was subject to liens pursuant to 46 U.S.C. §971. The Pinthis; Victory Carriers, Inc. v. Morner, 286 F.2d 122 (3rd Cir. 1923). The "Aries Startrek" was launched 18 years prior to the institution of this suit and had been documented as a vessel at least 13 years prior to the institution of this suit.

The survey and newspaper articles upon which the petitioner attempts to rely as "evidence" do not appear in the record in the District court. Respondent will not argue the propriety of a collateral attack upon the jurisdiction of the District court by extrinsic evidence in the absence of a request from this court to do so. Such argument is unneccessary in light of the analysis set forth in The Gleneden, 254 U.S. 522; 41 S. Ct. 185 (1921), and Morrison v.

District Court, 147 U.S. 14; 13 S. Ct. 246 (1893).

The extraordinary writs of mandamus and prohibition will issue only on a showing of extreme circumstances and only where a party seeking the writ has no other remedy. Morrison v. District Court, 147 U.S. 14; 13 S. Ct. 246 (1893). The petitioner has stated that the remedy provided by the Eleventh Circuit was inadequate. The petitioner had an adequate remedy by way of appeal to The Eleventh Circuit if he had not failed to timely file his Notice of Appeal.

The Petitioner failed to appear and present any evidence to the District Court and the Petitioner failed to timely file a Notice of Appeal in The Eleventh Circuit. What petitioner now seeks is to have this court relieve him of the burden created by his own errors.

CONCLUSION

For the foregoing reasons the Respondents pray that this Court deny The Petition of Bernard J. Dolenz for Prohibition or Mandamus or Both and grant Respondents such additional relief as may be appropriate.

Respectfully submitted,

STEVEN L. PERRY
555 Colorado Avenue
Stuart, Florida 34995
(407) 287-2600

Counsel for Respondent

January 25, 1989

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-971

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

In re: BERNARD J. DOLENZ, Petitioner

APPENDIX TO THE RESPONSE TO PETITION FOR A WRIT OF PROHIBITION, WRIT OF MANDAMUS, OR BOTH

BERNARD J. DOLENZ
6102 Swiss Avenue
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(214) 821-0220

Petitioner, Pro Se

STEVEN L. PERRY
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Stuart, Florida 34995
(407) 287-2600

Counsel for Respondent

January 25, 1989

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida Corporation,

Plaintiff,

vs. FINAL JUDGMENT

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.
_____/

THIS MATTER was tried before the Court, without a Jury, on March 16, 1987.

In addition, presently before the Court is a Motion For The Award of Costs and Attorneys' Fees (DE 33) filed herein by the Plaintiff, Stuart Yacht Builders, Inc.

Present for the bench trial on March 16, 1987 were counsel for the Plaintiff and Ms. Melissa Keyes. Ms. Keyes was accompanied by her counsel of record. Ms. Keyes had filed a Claim (DE 13) claiming that she was

the owner of the seized property. The Claim bore Ms. Keyes signature, was notarized and "sworn to."

Prior to the commencement of trial, Ms. Keyes stated in open court that she had transferred all of her ownership interest in the Defendant vessel to Mr. Bernard Dolenz on March 15, 1987. Ms. Keyes handed up to the Court a copy of the written "Assignment" dated March 15, 1987. She further stated that she had no further interest in said vessel. These representations were not disputed by her lawyer and indeed, formed the basis for the ore tenus Motion to Withdraw as counsel for Ms. Keyes and the Defendant vessel made by the law firm or Roberts & Reynolds in open court. This Court in its Order (DE 24) dated March 19, 1987, granted the ore tenus Motion to Withdraw.

As is reflected in this Court's prior Order (DE 24), at no time was Mr. Bernard

Dolenz present in court and at no time did any individual appear on his behalf. Ms. Keyes stated that she was not authorized to represent Mr. Dolenz or to speak on his behalf but that she had spoken with himover the course of the previous weekend and that Mr. Dolenz was aware of the date of trial and "hoped" for a continuance. At no time prior to trial did Mr. Dolenz or any representative of Mr. Dolenz request a continuance of the trial of this matter.

Ms. Keyes further advised the Court that Mr. Dolenz had not and did not wish to retain Ms. Keyes' counsel of record to represent the Defendant vessel in the above-styled cause. Ms. Keyes further stated to the Court that Mr. Dolenz would represent himself. Additionally, Ms. Keyes stated that she discharged the law firm of Roberts & Reynolds and Mr. Lyman Reynolds, Jr., Esquire, her counsel of record from any

further representatiton of her and the Defendant vessel in this cause.

This Court is not asked to pass upon the validity of the hand-written "Assignment" and no comment is made by the Court on that issue. However, assuming arguendo that the "Assignment" is valid, this Court notes that Bernard Dolenz had notice of this bench trial and for whatever reasons chose not to appear. Assuming arguendo that the "Assignment" is not valid, then Ms. Keyes was present and in court during the entire bench trial and for whatever reasons chose to discharge her lawyer and further chose not to proceed in the matter or to put on any testimony or evidence in support of her claim.

Accordingly, the Court proceeded with the bench trial of this cause, there being no good and sufficient reason to continue same.

The Plaintiff presented documentary evidence and testimony through witnesses, Mr. Gregory Burdick and Mr. Raymond Sees.

Subsequent to the bench trial, counsel for the Plaintiff filed Motion for The Award of Costs And Attorney's Fees (DE 33), attaching to said Motion as Exhibit "A" and itemization of all time spent and the charges for same; Exhibit "B", which is a supporting Affidavit for attorney's fees; Exhibit "C" an Affidavit with respect to time spent by counsel for the Plaintiff; and Exhibit "D" which is and Affidavit of Costs.

At the conclusion of the Plaintiff's case and after the Plaintiff rested, the Court called the case of the Defendant or any claimant. There was no response and no individual appeared in the courtroom on behalf of the Defendant and, although present in the courtroom during the entire proceeding, Ms. Keyes did not come forward and put on any testimony or evidence.

The Court notes that Bernard J. Dolenz represents himself to be a lawyer in the State of Texas as well as a medical doctor.

Based on the testimony presented by the Plaintiff, the documentary evidence received by the Court, and the Court having reviewed the court file makes the following Findings of Fact and Conclusions of Law. To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such. Conversely, to the extent that any of the following Conclusions of Law constitute Findings of Fact, they are adopted as such.

FINDINGS OF FACT

1. Pursuant to the testimony at trial, the documentary evidence and the Claim (DE 13) filed by Melissa Keyes, the Court finds that Melissa Keyes at all times material was the owner of the vessel, Aries Startrek, and that all necessaries provided said vessel

were ordered by the owner or the owner's authorized agent.

2. Stuart Yacht Builders and Melissa Keyes entered into an agreement to perform services on the vessel Aries Startrek on July 1, 1985. (Plaintiff's Exhibit No. 3).

3. Stuart Yacht Builders agreed to dry dock the "Aries" at the rate of $216.00/month from 11-1-85 to 12-2-86 and $432.00/month thereafter. (Plaintiff's Composite Exhibit No. 6.)

4. The services were performed to return the vessel to proper navigational condition.

5. The services were performed in a workmanlike fashion and the time expended was reasonable.

6. All unpaid sums accrued interest at the rate of 18% per annum. (Plaintiff's Exhibit Nos. 3, Composite 6, and 19.)

7. On July 3, 1986 process of warrant for arrest of the "Aries" its tackle and apparel, was issued.

8. On July 10, 1986 process was served on the vessel and its tackle by the U.S. Marshal and custody relinquished to Greg Burdick as Court Appointed Substitute Guardian.

9. As substitute custodian, Stuart Yacht Builders provided maintenance, storage, security and bookkeeping services for the "Aries."

10. In accordance with the work authorization, Stuart Yacht Builders provided Ship Repair Liability Insurance for the "Aries." (Plaintiff's Exhibit Nos. 3 and Composite 6.)

11. In accordance with the work authorization, Stuart Yacht Builders provided Hull Liability Insurance for the "Aries." (Plaintiff's Exhibit Nos. 3, Composite 6 and 19.)

12. In accordance with this Court's Order of July 3, 1986 appointing Stuart Yacht Builders Substitute Custodian, Hull

Liability Insurance was provided for the "Aries." (Plaintiff's Exhibit Nos. Composite 6 and 19.)

13. As Substitute Custodian, Stuart Yacht Builders paid all storage charges for the warehouse containing the "Aries" tackle and apparel. (Plaintiff's Exhibit Nos. Composit 6 and 19.)

14. The "Aries Startrek" is a vessesl within the meaning of 46 U.S.C. Section 971.

15. No testimony or physical or documentary evidence was presented by the Defendant or any Claimant.

16. The Court finds that the following costs incurred by the Plaintiff, through its attorney are authorized by law:

Clerk, United States District Court - Filing custodial bond	$ 500.00
United States Marshal Arrest vessel	1,000.00
Marshal's Ins. and fees	1,000.00

Stuart News Notice of Publication	22.10
TOTAL	$2,522.10

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to 28 U.S.C. Section 1333.

2. This is an Admiralty and Maritime Claim within the meaning of Rule 9(h).

3. The Plaintiff is a corporation doing business in the Southern District of Florida.

4. The vessel subject to this action is within the jurisdiction of this Court and the court has jurisdiction over same.

5. The "Aries Startrek" is a vessel within the meaning of 46 U.S.C. Section 971.

6. The services, repairs, drydock and necessaries furnished by the Plaintiff are within the scope of 46 U.S.C. Section 971.

7. The services, repairs, drydock and necessaries were furnished by the Plaintiff

upon the authority of a person within the scope of 46 U.S.C. Section 972.

8. A rebuttable presumption of a maritime lien is created by the furnishing of necessaries ordered by the owner or the owner's authorized agent. Belcher Oil Company v. M/V Gardenia, 766 F.2d 1508 (11th Cir. 1985); 46 U.S.C. Section 971.

9. The Defendant and the owner (Claimant) have not overcome the rebuttable presumption of a maritime lien and have failed to satisfy their burden of proof in establishing that the providing of the necessaries was not authorized to bind the vessel or the owner.

10. The Plaintiff is entitled to a maritime lien pursuant to 46 U.S.C. Section 971 and to a judgment foreclosing the lien.

11. The Plaintiff is entitled recover reasonable custodia legis expenses.

12. Absent some statutory authorization, the prevailing party in an admiralty case is not generally entitled to an award of attorneys' fees. Noritake Co., Inc. v. M/V Hellenic Chamption, 627 F.2d 724 (5th Cir. 1980) Therefore, no attorneys' fees will be awarded to the Plaintiff in this matter.

Accordingly, it is

ADJUDGED that the Plaintiff, Stuart Yacht Builders, Inc., a Florida corporation, shall recover against the Defendant, Aries Startrek, Enrollment No. 555798, Together with All Tackle And Apparel, the following sums:

a) Sales tax with interest due through 3/16/87	$1,719.61
b) Repair ins. with interest due through 3/16/87	477.87
c) Hull ins. with interest due through 3/16/87	3,904.83
d) "Mini Bay" storage with int. due through 3/16/87	882.67
e) Storage charges with int. due through 3/16/87	7,085.72

f) Labor and material with int. due through 3/16/87	22,307.08
g) Additional costs incurred as Substitute Custodian	
i) routine maintenance	952.00
ii) bookkeeping expenses	420.00
h) Court costs	2,522.10
TOTAL DUE THROUGH TRIAL - 3/16/87	$38,899.88

IT IS FURTHER ADJUDGED that prior to the time set for sale below, the vessel may be redeemed by paying a total of the sums due to the Plaintiff, together with interest at the rate of twelve (12%) percent per annum and all costs of this action accruing subsequent to this Judgment. If the Plaintiff is not paid prior to the time set for the sale, then the Marshal of This Court shall sell the vessel on the ____ day of ____ __, 1988, at ____ o'clock _.m. to this highest bidder for cash, except as set forth hereinafter.

Prior to the above-referenced sale date, the Marshal shall have filed with This Court

and provided a copy to counsel of record, proof of compliance with Local Rule 4 regarding publication of the Notice of Sale. Upon holding the sale, a single Certificate of Sale, Certificate of Title and Certificate of Disbursement shall be filed as to the vessel sold and the proceeds of the sale shall be applied to the Judgment of Record and to satisfy any costs incurred by the Plaintiff subsequent to the Judgment. In the event that there is an excess above and beyond the Judgment and costs, this amount shall be placed in the registry of the Court to be disbursed upon the appplication of the individuals claiming to be the owners of the vessel at the time this Judgment was entered.

IS FURTHER ADJUDGED that the Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the Clerk if the Plantiff is not the purchaser of the vessel. If the

Plaintiff is the purchaser of the vessel, the clerk shall credit the Plaintiff's bid with the total sums due pursuant to the Judgment together with interest and anycosts incurred subsequent to judgment.

On the filing of the Certificate of Title, all named Defendants to this action and all persons claiming under or against those Defendants since the filing of the original Proof of Publication in this action shall be foreclosed of all claims and interest in the vessel the "Aries Startrek" as fully described in the Certificate of Title, and the purchaser at the sale shall be let in possession of the vessel.

IT IS FURTHER ADJUDGED that jurisdiction of ths action is retained for the purpose of entering such further Orders as may be necessary and proper including with limitation writs of possession.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 16th day of February, 1988.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

Steven L. Perry, Esquire

Melissa Keyes
c/o Turks Island Divers
Hotel Kittina
P.O.Box 42, Grand Turk
Turks and Caicos, British West Indies
or

P.O. Box 281
Deltaville, Virginia 23043
or

6868 Southeast Gaines Avenue
Stuart, Florida 34997
or

816 Southeast Ninth Street
Deerfield Beach, Florida 33441
or

Box 266781, West Oakland Park Blvd.
Fort Lauderdale, Florida 33311

U.S. Marshals Service

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida corporation,

Plaintiff,

vs. ORDER

ARIES STARTREK, Enrollment
No. 555798, together with
all tackle and apparel,

Defendant.

_____/

THIS MATTER is before the Court upon the Motion for Intervention (DE 25), the Motion To Dismiss and Motion To Reconsider (DE 27) and the Motion for Sanctions (DE 35) filed herein by Bernard Dolenz and the Court having reviewed the merits of said Motions, having reviewed the court file and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. The Motion For Intervention (DE 25) filed herein by Bernard Dolenz be and the same is hereby DENIED;

2. The Motion to Dismiss And Motion to Reconsider (DE 27) filed herein by Bernard Dolenz be and the same is hereby DENIED; and

3. The Motion for Sanctions (DE 35) be and the same is hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 25th day of September, 1987.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
Bernard Dolenz,
Stephen Perry, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-8384-CIV-ZLOCH

STUART YACHT BUILDERS, INC.,
a Florida corporation,

Plaintiff,

vs. ORDER

ARIES STARTREK, ENROLLMENT
NO. 555798, TOGETHER WITH
ALL TACKLE AND APPAREL,

Defendant.
_____/

THIS MATTER is before the Court upon the Motion To Substitute Parties (DE 53) and the Motion to Extend Time to Appeal (DE 54) filed herein by Mr. Bernard J. Dolenz.

This Court further notes that Mr. Bernard J. Dolenz has filed a Notice Of Appeal, appealing the Final Judgment (DE 51) previously entered herin. Although this Court may not have jurisdiction over the Motions aforementioned, for the benefit of the reviewing court, this Court will

consider and rule upon the Motions aforementioned.

This Court notes the inconsistencies in the statements of Mr. Bernard J. Dolenz which have plagued this case. For example, the Court notes that in Mr. Dolenz's Motion to Substitute Parties (DE 53), Mr. Dolenz states in Paragraph No. 2 that Melissa Keyes assigned her ownership interest in the Defendant vessel to Mr. Dolenz as of March 15, 1987, said assignment being received in Dallas, Texas. Mr. Dolenz then turns right around and in an Affidavit attached to his Motion to Extend Time to Appeal (DE 54), he states that there was an oral agreement for an assignment of all of the rights of the Defendant vessel March 15, 1987, the written assignment not being received by Mr. Dolenz until on or about March 26, 1987 in Dallas, Texas. In his Affidavit, Mr. Dolenz goes on to express the view that Melissa Keyes had

"equitable title" to the vessel at the time of the final hearing on March 16, 1987.

In a Motion For Sanctions (DE 35) filed by Mr. Dolenz, Mr. Dolenz states in Paragraph No. 1 of that Motion that Melissa Keyes transferred her interest in the vessel through her agent on March 14, 1987 in Dallas, Texas. The Court further notes that in a Motion To Dismiss (DE 28) filed by Mr. Dolenz, he states on Page 2 of that Motion that Melissa Keyes had equitable title to the Defendant vessel March 16, 1987 as the assignment to Bernard Dolenz had not been delivered to him or his attorney.

The Court in its Final Judgment did not make any determination of the validity of the alleged asignment from Melissa Keyes to Bernard Dolenz. However, the Court points out that the action in this case is an action in rem to enforce a maritime lien. The Defendant in the case is the vessel, Aries Startrek, not Melissa Keyes.

Therefore, any assignment of interest in the vessel had no effect on the initial in rem action against the Defendant vessel. The vessel at all times material has been in the Southern District of Florida and the Court has never lost in rem jurisdiction of the Defendant vessel.

The court file and the record clearly reflect the actions that have been engaged in by Melissa Keyes and Bernard Dolenz with respect to this proceeding. This Court is concerned with the good faith on the part of Melissa Keyes and/or Bernard Dolenz with respect to the forward progress of a case to final hearing. The above-styled cause was originally noticed for Calendar Call for February 20, 1987 by Order (DE 16) dated February 3, 1987. The Minutes (DE 18) from the Calendar Call reflect both sides as "ready" for trial. The Final Hearing commenced on March 16, 1987. Therefore, there was plenty of advance notice given to

the parties with respect to the Final Hearing.

If parties are allowed to engage in such "surprise tactics" as the maneuvers seen in this proceeding by Ms. Keyes and Mr. Dolenz, then it is conceivable that a case would never get to Final Hearing.

This Court has carefully considered the merits of the Motion to Substitute Parties (DE 53) and Motion To Extend Time To Appeal (DE 54). The Court finds no excusable neglect as a basis to extend the time to appeal.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that the Motion to Substitute Parties (DE 53) and the Motion to Extend Time to Appeal (DE 54) be and the same are hereby DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 22nd day of April, 1988.

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:

Counsel of Record and Individuals
on attached mailing list.

STUART YACHT BUILDERS, INC. v. ARIES STARTREK, Etc., CASE NO. 86-8384-CIV-ZLOCH

Steven L. Perry, Esq.,
for Plaintiff
Post Office Drawer 24
Stuart, Florida 34995-0024

Melissa Keyes
c/o Turks Island Divers
Hotel Kittina
P.O. Box 42, Grand Turk
Turks and Caicos, British West Indies
or

P.O. Box 281
Deltaville, Virginia 23043

or
6868 Southwest Gaines Avenue
Stuart, Florida 34997

or

816 Southwest Ninth Street
Deerfield Beach, Florida 33441

or
Box 266781, West Oakland Park Blvd.
Fort Lauderdale, Florida 33311

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-5360

STUART YACHT BUILDERS, INC.,

Plaintiff-Appellee,

versus

ARIES STARTREK, Enrollment No. 555798, together with all tackel and apparel,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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Before RONEY, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

B Y T H E C O U R T:

The appeal is dismissed for lack of jurisdiction because the notice of appeal was untimely. Fed.R.App.P 4(a)(1); Campbell

v. Wainwright, 726 F.2d 702, 703 (11th Cir. 1984). Lack of notice of the entry of an order or judgment by the clerk does not affect the time to appeal. Fed.R.Civ.P. 77(d). Furthermore, the district court denied appellant's motion for extension of time to appeal. Fed.R.App.P. 4(a)(5).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87-5862

IN RE:

BERNARD J. DOLENZ,

Petitioner.

(Filed October 21, 1987 in the U.S. Court of Appeals, Eleventh Circuit by Miguel J. Cortez - Clerk).

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Florida

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Before HILL and FAY, Circuit Judges.

The Petition for Writ of Mandamus is denied.

AGENT

Form approved
Budget Bureau No. 48-R1816.

MASTER CARPENTER'S CERTIFICATE
(BUILDER'S CERTIFICATE)

PLACE: Taipei, Taiwan Republic of China | DATE: Dec. 31, 1968 | NAME OF MASTER OR PRINCIPAL CARPENTER: Y. Chen, Taiwan Yacht Industries, Inc.

ADDRESS: No. 4 Nanking E. Road, Sec-1, P.O. Box 1313, Taipei, Taiwan, Republic of China

RIG[1]: Ketch Rig

NAME OF THE VESSEL[2]: QUICKSTEP II | HULL NO.: 8

VESSEL WAS BUILT (*Insert "By me," "Under my direction," or "By ..... " giving firm or corporate name, if applicable*): Taiwan Yacht Industries, Inc.

YEAR OF COMPLETION: 1968 | PLACE WHERE BUILT[3]: Taipei, Taiwan, Republic of China | MATERIAL OF BUILD[4]: Wood

NAME OF PERSON OR PERSONS FOR WHOM BUILT AND INDIVIDUAL INTEREST OWNED

Bayard L. Kilgour, III
4500 Drake Road
Cincinnati
Ohio 45243
U. S. A.

NUMBER OF DECKS	NUMBER OF MASTS	CONTOUR OF STEM	SHAPE OF STERN
one	two	raked stem	transom

LENGTH OF VESSEL[5]	BREADTH OF VESSEL[5]	DEPTH OF VESSEL[5]
approx. 72' — TENTHS — FEET	30' — TENTHS — FEET	5' — TENTHS — FEET

GROSS TONNAGE: 110,000 lbs. without equipment | NET TONNAGE:

[1] Insert here the rig of the vessel. For a vessel having a steam engine write "steam side wheel," "steam stern wheel," "steam screw"; and for a vessel having an internal combustion engine write "gas (or oil) side wheel," "gas (or oil) stern wheel," "gas (or oil) screw," or as the case may be.
[2] The name given herein shall be in exact agreement with the lettering as marked on the vessel itself.
[3] Write the name of the city or town at or nearest to which the vessel was built, and include the name of the state and country.
[4] Insert "wood," "iron," "steel," or as the case may be.
[5] Dimensions are to be calculated as specified in R.S. 4150.

THE FOLLOWING ADDITIONAL PARTICULARS SHALL BE GIVEN FOR THE ENGINE OF MACHINERY-PROPELLED VESSELS

TYPE OF ENGINE (*Reciprocating, beam, turbine, etc., if steam, oil, gas, etc., if internal combustion*): not installed

PLACE WHERE BUILT | YEAR BUILT

BUILT BY

POWER (*Steam, heavy oil, light oil, gasoline, naphtha, etc.*)

NOTE.—An *oil* engine is an internal-combustion engine in which the fuel is injected into the air that is under compression in the cylinder, the combination is ignited by the heat generated from the compression (Diesel type), or from additional outside heat when that in the cylinder is not sufficient (Semi-Diesel type). A *gas* engine is also an internal combustion engine, but in it the fuel and air are admitted into the cylinder simultaneously and the combination is ignited by a spark.

I certify that the information given above is true and correct to the best of my knowledge and belief.

The master carpenter or builder shall not sign this certificate until he knows that the name as above written agrees *exactly* with that marked on the vessel.

TAIWAN YACHT INDUSTRIES, INC.

SIGNATURE OF MASTER CARPENTER OR BUILDER

CUSTOMS FORM SEPT 62 1261

Y. Chen

BEST AVAILABLE COPY

A TRUE COPY OF THE LAST CONSOLIDATED CERTIFICATE OF ENROLLMENT AND YACHT LICENSE

Permanent or Temporary	The United States of America	Official No.	
PERMANENT		555798	
Certificate No. [illegible]			

Measured at Miami, Fla ....., 19 73

Rebuilt at ....., 19.....

Remeasured at ....., 19..... Horsepower 260

CONSOLIDATED CERTIFICATE OF ENROLLMENT AND YACHT LICENSE

LICENSE OF YACHT UNDER TWENTY TONS

In conformity to Title L, "Regulation of Vessels in Domestic Commerce," and Chapter Two, Title XLVII, "Regulation of Commerce and Navigation," of the Revised Statutes of the United States, and to "An act to amend Sections 4214 and 4218 of the Revised Statutes Relating to Yachts," approved August 29, 1912

Joyce G Castilloux (460-46-7427) of 193 SE Riverbend St, Stuart, Fla 33494, Managing owner

having taken and subscribed the oath ..... required by law, and having sworn ..... that

Joyce G Castilloux, Philip J Castilloux, Steven J Castilloux
Keith E Castilloux, Connie J Castilloux, Philip J Castilloux
Joint tenants with owner equal shares with right of survivorship
193 SE Riverbend St , Stuart, Fla 33494

This vessel shall not engage in the coastwise trade or the American fisheries

are citizens of the United States and the sole owner of the vessel called the

Wahini (ex-Wickstep II) ..... of West Palm Beach, Fla

and that the said vessel was built in the year 1968 at /Taipei, Taiwan of wood

as appears by Certificate of Y Chan, Master Carpenter of Taiwan Yacht Industries, Builder

and L. J. Karlin, Admeasurer having certified that

the said vessel is a oil catamaran ; that she has

one deck , two masts , a raked stem, and a round stern; that her

register length is 67.0 feet, her register breadth 30.0 feet, her register depth 10.8 feet,

her height feet; that she measures as follows:

	Tons	Hundredths
Capacity under tonnage deck	75	47
Capacity between decks above tonnage deck		
Capacity of enclosures on the upper deck, viz: Forecastle ; bridge ; poop ; trunk ; house—deck / 67.0 ; mast ; trunks ; engine hatchways ; light and air ;	10	88
Gross Tonnage	86	35
Deductions under Section 4153, Revised Statutes, as amended (Sec. 77, title 46, U.S. Code):		
Crew space, ; master's cabin, ;		
Steering gear, ; anchor gear, ; boatswain's stores ;		
Chart house, ; donkeys engine and boiler, ; radio room, ;		
Storage of sails, ; propelling power (actual space 6.84), 32/100 ;	16	84
Total Deductions	69	
Net Tonnage		

The following-described spaces, and no others, have been omitted, viz: Forepeak , afterpeak , other spaces (except double bottoms) for water ballast ; open forecastle , open bridge , open poop , open shelter deck , open houses , cabins , companions 64, galley , skylights , wheelhouse , water closets ; anchor gear , donkey engine and boiler , steering gear , light and air spaces , other machinery spaces ,

and [illegible], the officer, having agreed to the description and measurement above specified, the said vessel has been duly ENROLLED at the PORT;

And [illegible], the master, having sworn that he is a citizen of the United States, that this vessel, used and employed exclusively as a PLEASURE VESSEL or designed [illegible] model of naval architecture, shall not, while this license continues in force, transport merchandise or carry passengers for hire, or engage in any unlawful trade, nor in any way violate the revenue laws of the United States, and shall comply with the laws in all other respects:

LICENSE is hereby granted for the said YACHT to proceed from port to port in the United States without entering or clearing at the customhouse, and to foreign ports without clearing in the United States. This LICENSE will continue and be in force for ONE YEAR from the date hereof, and no longer.

Given under my hand and seal at the Port of West Palm Beach, Florida

District of [illegible] this 28th day of May

in the year one thousand nine hundred and seventy four

Signed Jack F Starkey
Jack F STARKEY, Documentation Officer
by Direction

Strike out title if vessel is licensed only. Strike out this and following line, if vessel is licensed only.

Strike out "Treasury Department" or "Department of Transportation" as appropriate.

Strike out "U.S. Customs Service" as appropriate

Strike out "Documentation Officer" as appropriate

65

BEST AVAILABLE COPY

DEPARTMENT OF TRANSPORTATION
U.S. Coast Guard
CG 1340 (Rev. 5-87)

BILL OF SALE

OMB APPROVED
2135-0110

1. VESSEL NAME

ARIES STARTREK

2. OFFICIAL NUMBER

535798

3. NAME(S) OF SELLER(S) AND INTEREST OWNED BY EACH

JOYCE G. CASTILLOUX, PHILIP E. CASTILLOUX & KEITH M. CASTILLOUX surviving tenants of a joint tenants, each owning equal shares with right of survivorship 100%

4. NAME(S) OF BUYER(S) AND INTEREST TRANSFERRED TO EACH

5. CONSIDERATION RECEIVED

Ten Dollars ($10.00) & other good and valuable considerations

6. I (we) do hereby sell to the buyer(s) named above, my (our) right, title, and interest in the vessel together with the following necessaries and appurtenances:

This sale is made to the buyers on the proportion specified, subject to the following warranties and conditions: The Seller warrants that the vessel is free and clear of all liens, bills, mortgages, taxes or encumbrances of any nature or kind and hereby agrees to indemnify and save harmless the purchaser against and from any and all claims arising by reason of anything happening or occurring prior to date hereof and all expense in connection therewith.

7. SIGNATURE(S) OF SELLER(S)

By: Keith M. Castilloux
Joyce G. Castilloux By: Philip E. Castilloux

8. DATE

9. CAPACITY

10. ACKNOWLEDGEMENT (Insert such acknowledgement language as is required by state law.)

State of Hawaii County of Hawaii

BE IT KNOWN, That on this 6th day of August, 19 85, Personally appeared Joyce G. Castilloux & Philip E. Castilloux, to me known and known to me to be the person/s who signed his/her/their name (s) to the within instrument, and acknowledged the same to be his/her/their free act and deed.

IN WITNESS WHEREOF, I have hereby set my hand and seal this 6th day of August A.D., 19 85

SEAL

My commission expires: 8-6-89 (ALSO SEE REVERSE)

Anna M. Ajona
Notary Public

The acknowledgement may not be taken by an officer or employee of the Coast Guard.

1/If vessel has never been awarded an official number, complete those items of vessel data on reverse of form as are known.

Previous Editions Obsolete

SN 7530-00-981-1030

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

STUART YACHT BUILDERS, INC.,)

vs. CASE NO. 88-971

Aries Startrek together with
all tackle and apparel.

Defendant.

_____/

TRIAL TRANSCRIPT

Before the HONORABLE WILLIAM J. ZLOCH,

United States District Judge.

APPEARANCES OF COUNSEL:

For the Plaintiff:

Crary, Buchanan, Bowdish & Bovie
BY: Steven L. Perry, Esquire
and Robert L. Lord, Jr., Esquire
555 Colorado Avenue, Suite One
Stuart, Florida 34994

For the Defendant Keyes:

REYNOLDS & ROBERTS
BY: Lyman H. Reynolds, Esq.
319 Clematis Street
West Palm Beach, Florida

Reported by: Gary D. George
810 N.W. 86 Avenue
Plantation, Florida 33324
305-476-0723

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Gregory Burdick	19			
Raymond Seese	30			

P R O C E E D I N G S

THE DEPUTY CLERK: Calling case 86-8384-Civ-Zloch, Stuart Yacht Builders, Inc. versus Aries Startrek together with all tackle and apparel.

Counsel, please, state your appearance for the record?

MR. PERRY: Steve Perry and Robert Lord on behalf of the Plaintiff.

THE COURT: Good morning.

MR REYNOLDS: Lyman Reynolds and Bill Zidno on behalf of the Defendants.

THE COURT: All right, Mr. Reynolds, you wanted to address the Court, sir?

MR. REYNOLDS: Yes, sir.

As I have apprised Your Honor's staff since Friday when we were apprised of this case going to trial today on Monday, we have been trying to get ahold of our client, the owner of the Aries Startrek, Ms. Keyes.

I spoke with your secretary on Friday and again this morning at 8:30 I spoke with your

secretary and the Clerk Deputy at 8:30 with regard to our inability to locate Ms. Keyes.

At 9:15 as we were preparing to leave for court here this morning Ms. Keyes called from the courthouse here to inform me that she was here and she had received a message that we had left throughout all of here known addresses, acquaintances, associates.

However, at that time for the first time she informed me that she no longer owned the Aries Startrek.

I would point out to Your Honor that she had filed an affidavit of ownership and had hired my firm to represent her in this matter.

THE COURT: Hold on for a minute.

MR. REYNOLDS: That was filed in August, Your Honor.

THE COURT: Docket entry 13 in the court file is a claim of Melissa Keyes which states in paragraph one, "Melissa Keyes is the owner of seized property identified as

Aries Startrek enrollment number and it is 555798 together with all tackle and apparel of said vessel."

Paragraph two reads in part: "Melissa Keyes is the owner of the aforementioned vessel and any of the tackle, apparel, appurtenances and other equipment in possession of the Plaintiff."

Paragraph three reads in its entirety: "Melissa Keyes, as the owner of the Aries Startrek, and its tackle and appurtenances, apparel and equipment demands its restitution and the right to defend this action."

Then there is a signature line which purports to bear the signature of an individual identified as Melissa Keyes and then it is sworn to and subscribed on the first day of August, 1986, bearing the impression seal of a notary public of the State of Florida by the name of Lori Ann Bielak and there is a signature line which

purports to bear the signature of an individual by the name of Lori Ann Beilak.

That is docket number 13 in the court file.

There is nothing else in the court file that indicates that Melissa Keyes is not the owner of the Aries Startrek and the claim that I earlier refered to, docket entry number 13, has not been modified or withdrawn by and pleading or motion filed in the court files as of right now.

And you, Mr. Reynolds, you were informed when, sir, that Ms. Keyes, in facts, does not, at least you were told that she does not own the vessel in question?

MR. REYNOLDS: I was told by Melissa Keyes this morning at 9:15 when she contacted my office from the courthouse telling me that she had received the message about the proceedings this morning. "And there is something else I need to tell you, I no longer own the Aries Startrek. It has

been transferred to an individual in the State of Texas."

THE COURT: When did that transfer of ownership take place?

MR. REYNOLDS: Well, I have an assignment of interest dated March 15, 1987, which was handed to me at a quarter of 11:00 this morning, twenty minutes ago by Ms. Keyes.

Ms. Keyes is here and can testify with regard to her lack of ownership, what her representations to me in that regard have been and my knowledge that for the first time I am no longer retained by the owner of the vessel.

The individual, Bernard Dolenz, is in Dallas, Texas. He is an attorney there. I have been informed by Ms. Keyes that he wants to represent himself on behalf of the boat in this action and I have not been retained nor has my firm been retained by Mr. Dolenz in this action.

THE COURT: Is Ms. Keyes in the courtroom?

THE REYNOLDS: Yes,sir.

THE COURT: Are you Ms. Keyes?

MS. KEYES: Yes, sir.

THE COURT: All right, go ahead, Mr. Reynolds.

MR. REYNOLDS: It would be my request on behalf of our firm that we be, it's moot, we are no longer representing the vessel. We have not been retained by the true owner of the vessel.

We have just learned of this and would have filed a motion to that effect earlier with the Court if we had been apprised of it any earlier than today.

I have been informed that Mr. Dolenz does not want to retain our firm to represent him in this matter on behalf of the vessel. He wishes to represent himself as an attorney and would want to be substituted as counsel and that he wants to continue the action in

order for him to adequately defend the action and with regard to a continuance in this matter I would simply want to point out to the Court that--

THE COURT: You are not authorized to make any motion for continuance on behalf of the new owner; are you?

MR. REYNOLDS: No Sir. He has not retained me for that purpose. This was just given to me by Ms. Keyes that that was his desire. I have not spoken with Mr. Dolenz at all with regard to this matter.

The position with regard to a continuance in this case would be, I assume, the fact that we have $180,000 vessel which is owned outright except for this action.

This action in the complaint seeks $26,000 in material, man, wharfage and other propert maritime lien action. It's not an impersonam action at all. And the value of the vessel is, at least, five times the value of the claim against it.

Therefore, there would not be any prejudice in allowing Mr. Dolenz his continuance of this matter to the plaintiff.

But as Your Honor has correctly pointed out, Mr. Dolenz, has not authorized me to make that motion on his behalf.

I have been retained in no way by him.

However, that desire has been passed on to me by Ms. Keyes.

THE COURT: All right, let me hear from Ms. Keyes.

MR. REYNOLDS: Do you want her to take the stand?

THE COURT: I would like her to step up to the podium.

Ma'am, state your name for the record?

MS. KEYES: My name is Melissa Keyes.

THE COURT: Mr. Reynolds, with respect to the assignment of ownership or what was the document that your referred to?

MR. REYNOLDS: This is a handwritten notice of assignment of interest in Aries Startrek.

THE COURT: May I see that, please?

Ms. Keyes, explain to me what the document is that you have there?

MS. KEYES: Well, sir, Mr. Dolenz has been a partner of mine on this boat for several months now. I showed it to him just after Christmas and he loved the boat and he wanted to buy an interest in it which he did and paid me.

And not being very well prepared for this case as I have been trying to settle out of court until just the day before, I don't know the term, the day before the court date was set. This weekend, I heard Saturday that I was going to have court today and I talked to Mr. Dolenz and we agreed that I would assign him full ownership of the boat or all the rest of my interest in the boat.

THE COURT: When was that decided on?

MS. KEYES: We discussed it Saturday and Sunday and decided on Sunday.

THE COURT: I'm sorry, which dates? You say Saturday and Sunday. Specifically, which dates?

MS. KEYES: The 14th and 15th.

THE COURT: Of March?

MS. KEYES: Yes, sir.

THE COURT: of 1987?

MS. KEYES: Yes sir.

THE COURT: This past weekend you decided to transfer your ownership to Mr. Dolenz?

MS. KEYES: That's correct.

THE COURT: For consideration?

MS. KEYES: Yes, sir.

THE COURT: And what was the consideration?

MS. KEYES: The considerations are that I will be the captain of the boat and perhaps in the future I can buy back into the ownership of the boat.

THE COURT: What is the date on that handwritten assignment?

MS. KEYES: March 15.

I was unable to fly back to Texas to do this and discussed everything on the telephone. He wanted to try to call you this morning. He's in court also.

THE COURT: Well, is he flying in for the trial.

MS. KEYES: He was unable to fly in today.

THE COURT: What arrangements is he making to fly in for the trial?

MS. KEYES: I haven't discussed that with him. He definitely wants to represent himself.

THE COURT: I am sorry, I thought that you discussed with him the fact that you weren't prepared to go to trial. I thought that is what you indicated to me?

MS. KEYES: That he was not able to get out of his obligations today. He has a court case today.

THE COURT: I am sorry, say that again?

MS. KEYES: He has a court case himself. He was unable to get out of his obligations to fly up here today for the trial today. It was--everything was such at the last minute.

THE COURT: Are you Mr. Dolenz's representative here in Court today? Are you his authorized representative?

MS. KEYES: Yes. Not to try the case, no.

THE COURT: Did Mr. Dolenz tell you that you were his authorized representative to come into this courtroom, in this federal building, into this United States District Courtroom and to represent him?

MS. KEYES: He didn't say that, no, sir. He said he wanted to represent his interest in the boat.

THE COURT: Did he authorize you to come into this courtroom today and to speak on his behalf?

MS. KEYES: No, sir.

THE COURT: Well, are you authorized to ask for a continuance of this trial on his behalf?

MS. KEYES: Yes.

THE COURT: what did he tell you with respect to that?

I mean, I would be interested in knowing specifically what he said to you?

MS. KEYES: He specifically, he was unhappy that-- he was unhappy that we were unable to settle with the boatyard before the case came up. We were trying all along to settle.

THE COURT: I believe Mr. Reynolds has indicated that, that he had been engaging in or the parties had been engaging in serious settlement discussions?

MS. KEYES: Yes, sir.

Mr. Dolenz didn't mention anything to me about myself representing his interest in the boat. He was hoping for a continuance so that he could properly prepare it.

THE COURT: Mr. Perry, do you have any questions?

MR. PERRY: No, Your Honor, I don't.

THE COURT: Ms. Keyes, am I pronouncing the last name correctly?

MS. KEYES: Yes, sir.

THE COURT: Is Mr. Dolenz retaining Mr. Reynolds and his firm to defend him in this action?

MS. KEYES: No, he won't.

THE COURT: All right, thank you, Ms. Keyes.

All right, Mr. Perry, what does the Plaintiff say about all this?

MR. PERRY: Your Honor, I know Lyman fairly well and I don't think there is any plan in this to, on his behalf at all to delay the case.

I do believe that he is not representing the owner. He lacks any capacity to represent them in court. Ms. Keyes obviously no longer has standing before this Court. The only possible procedure that we could probably undertake would be a rule 56 motion here now or to present evidence by affidavit later.

I don't see the point in going through a half a day's worth of trial when, in essence, we are in a default position.

Now I agree with Lyman that the continuance probably would not hurt my client in terms of the value of the collateral here. But he has been waiting for over a year and a half to recover. That it continues to accrue wharfage charges, it continues to require additional work to prevent deteriorating and all those things do, in fact, prejudice my client.

I have asked him and he is not in favor of a continuance. I don't believe that it is appropriate at this time.

THE COURT: Let me take a very short recess and then I will advise whether we will go forward with this proceeding.

(Recess.)

THE COURT: All right, is it Ms. or Mrs. Keyes?

MS. KEYES: Miss.

THE COURT: Let me ask you to step to the podium one last time, please.

I want to confirm several things. You have represented to the Court this morning that you had assigned all of your right, title and interest to the vessel in question to a Mr.Dolenz.

What is his first name?

MS. KEYES: Bernard.

THE COURT: And you did that on March 15th, 1987.

MS. KEYES: Yes, sir.

THE COURT: You have also, and this is why I have got you up here again. I want to make sure I understand what you have said here in Court this morning.

It's the Court's understanding that Mr. Dolenz does not wish for Mr. Reynolds or his firm to represent Mr. Dolenz here in the proceeding; is that correct?

MS. KEYES: True.

THE COURT: And are you at this time discharging Mr. Reynolds and his firm from further representation of you in this proceeding?

Is there something mysterious about that question?

MS. KEYES: No, sir. I hadn't thought of it. But I guess so. Before the case even came up to docket he had told me that he was resigning himself.

THE COURT: My question still is do you wish for Mr. Reynolds and his firm to continue to represent you?

MS. KEYES: No, sir.

THE COURT: And I believe that you represented to the Court here this morning that you are not authorized by Mr. Dolenz to act as his agent for the purposes of this proceeding; are you?

MS. KEYES: True.

THE COURT: I need to ask you again, because your response to my question about a continuance was, it kind of moved around a little bit and I had some difficulty following it. But did you represent to the Court that Mr. Dolenz authorized you to move for a continuance of this trial?

MS. KEYES: No, we were hoping for a continuance. But we didn't discuss him authorizing me to speak for him.

THE COURT: Thank you very much. That is all.

This Court has its concerns with respect to the eleventh hour assignment that has been represented here in open court by Ms.

Keyes to have taken place between herself and Mr. Dolenz on March 15th, 1987.

However, the Court is not here to rule upon the validity of that assignment except the Court notes for the record the Court's concerns over the good faith actions of this eleventh hour assignment, that is the good faith action between Ms. Keyes and the alleged new owner of the vessel in question, Mr. Bernard Dolenz.

The Court is going to grant Mr. Reynold's motion to withdraw and the Court grants the motion of Lyman H. Reynolds, Jr., Esq., and the law firm of Roberts and Reynolds to withdraw as counsel of record for the Defendant in this action based in particular on the references set forth in the motion to withdraw docket entry number 19.

Mr. Reynolds if you would provide the Court with a proposed order to that effect. And the Court so orders that Mr. Reynolds and his law firm further are discharged from

further representation with respect to the Defendant vessel and with respect to Mrs. Melissa Keyes in this proceeding.

Just so the record is clear, if some reviewing Court has to take a look at this proceeding, assuming arguendo that anything that Ms. Keyes has said here in Court this morning could be construed to be a motion for continuance, the Court is going to deny that motion for continuance.

Once, again, the Court noting its concern for the good faith involved in the eleventh hour activities that have taken place in this matter between Ms. Keyes and Mr. Bernard Dolenz, the Court also notes for the record that there has been no written motion for continuance filed by Mr. Dolenz, the alleged new owner of the vessel, and it is the Court's opinion that Mr. Dolenz has had sufficient time, it now being ten minutes of 12:00 Eastern Standard Time that Mr. Dolenz had sufficient time to have made contact

with the Court's chambers and there has been no such contact and also that Mr. Dolenz has had time to express mail here to the Court any motion for continuance, if he, Mr. Dolenz, was desirous of such.

Ms. Keyes having represented to the Court that Mr. Dolenz is a lawyer, the Court assumes that Mr. Dolenz would be familiar with the customary practice in moving for a continuance as opposed to hoping that there might be a continuance.

ORAL ARGUMENT REQUESTED

Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

No. 88-971

IN RE: BERNARD J. DOLENZ

Petitioner,

REPLY BRIEF TO RESPONDENT'S REPONSE TO PETITION FOR A WRIT OF PROHIBITON, WRIT OF MANDAMUS, OR BOTH

SUPPLEMENTAL APPENDIX

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

PREFACE

The Respondents' appendix does not comply with Rule 33. The Respondents give many distortions in their Brief, such as no telephone communication had been received (P-6), a "dead ship" straw man argument when this was plead ALTERNATIVELY to an unfinished vessel defense (P-9), failure to send documents such as motions before the court and the judgment even though the Court and the Plaintiff knew that Dolenz was the owner of the boat from Court testimony and documents before the Court evidencing such ownershio. This brief and supplemental appendix is given to correct the Respondents' distortions. Even a pancake has two sides.

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No. 88-971

IN THE SUPREME COURT OF THE UNITED STATES

In re BERNARD J. DOLENZ, Petitioner

REPLY BRIEF TO RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF PROHIBITON, WRIT OF MANDAMUS, OR BOTH

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Bernard Dolenz, owner of the Defendant Aries Star Trek, gives this his Reply Brief to Respondent's Reponse to the Petition for a Writ of Prohobition, Writ of Mandamus, or Both, and would show the Court as follows:

I. THE TRIAL COURT LACKS JURISDICTION AND THE CASE SHOULD BE DISMISSED

Lack of jurisdiction is plain, and it is indeed strange that with this evidence, the Zloch Court gave Findings that were contrary to these facts:

(1) The U. S. Marshall upon arresting the vessel 7/10/86 stated: "...Vessel is incomplete, under construction, and empty of equipment..." P-10, Appendix.

(2) Ray Seese, Plaintiff's expert and Marine surveyer states that the vessel has never been completely finished or commissioned... P-43, Appendix.

(3) Statements of Burdick in a local newspaper article that the Boat is abut 70% completed. P-44, Appendix.

These facts were pointed out to the Court with Motions to dismiss because of plain lack of an underpinning for a maritime contract March 18, April 4, April 18, and April 9, 1988. This makes one wonder who

authored the judgment.

The boat was never launched. The infrastructure was built in Taipei in 1968 and freightered to this country, with the intent to finish it here. The owner died, with the unfinished boat being moored in a river for over a dozen years while in an estate. The boat was moved to Stuart Yacht for work to begin its completion and launching. P-44, Appendix.

A boat that has never been completely finished or commissioned, as Ray Seese points out in his survey, lacks Admiralty jurisdiction. See Memorandum of Law, P-77 et seq.

II. THE ZLOCH COURT ERRED IN ALLOWING THE DEFENDANT ARIES STAR TREK TO BE WITHOUT COUNSEL BY DISMISSING COUNSEL AND REFUSING TO CONTINUE THE CASE, PLACING THE DEFENDANT VESSEL IN A DEFAULT POSITIION.

When the boat was arrested, Attorney Lyman Reynolds was hired to defend the vessel. Melissa Keyes told the Court that Bernard Dolenz was a partner with her in the boat, had an interest in it while Lyman Reynolds was defending the vessel. (Res. App. P-41). Reynolds tried to withdraw as counsel upon learning that Burdick received a unsubstantiated purported threat, which Burdick was imputing to the vessel. Docket P-45 Appendix. Motion to withdraw as counsel and Motion to continue were both denied March 12. On the 16th, the Court allowed Reynolds to withdraw as counsel, and refused to continue the case or even a suggestion to continue (P-52, Respon. Appendix).

Several phone calls were placed to Judge Zloch that morning by Bernard Dolenz (Affidavit of Bernard Dolenz attached to

Motion to Dismiss; Motion to Reconsider March 18, 1987; P-43 of Resp. Appendix; Affidavit, P-62), Why the Court refused to return phone calls to Dolenz and with Lyman Reynolds being allowed to abandon a case for which he was hired without a continuance seems abhorant to any system of justice, particularly when communications were made to the Court. Contrary to the statement on P-53 by the Court, there were contacts with the Judge's clerk about wanting a continance and a conversation with the judge. This request was not honored. Melissa Keyes, not being an attorney, told the Court that Dolenz was trying to call you (Zloch) this morning (P-43), was in Court in Texas (P-43), and was hoping for a continuance so that he could properly prepare the case (P-46) because Reynolds wanted to abandon the case, and did. From an interest standpoint, the Court

knew Dolenz had part interest several months earlier, and Reynolds was denied his motion to withdraw as counsel a couple days earlier. Reynolds was hired to represent the Aries Star Trek, the Defendant. When Melissa Keyes asssigned the remaining interest in the boat, giving full ownership to Dolenz, what difference did this make on defending the vessel? Furthermore, Melissa Keyes still had title to her remaining interest until such time as the assignment was DELIVERED. She had standing to continue, and Mr. Perry misrepresented to the Court that she lacked standing (P-47). The Court should either have allowed Mr. Reynolds to defend the vessel with the purported threat that Mr. Burdick alleged, or continue the case so that the defendant vessel could get substitute counsel.

The issue of Assignments is covered on P-71.

In VILLEGAS V. CARTER, 711 SW2d 624 (Tex 1986) the trial court abused its discretion in denying a motion to continuance after allowing the attorney to voluntarily withdraw two days before trial where the client was not negligenet or at fault in causing his attorney's withdrawal, the client had too short a time in which to find a new attorney and to have that attorney investigate the case and prepare for trial.

Similarly a trial court abused its discretion by denying continuance, and client was prejudiced thereby, where client had little or no advance notice that her counsel would withdraw on morning of trial of a complex matter. MILLS V MILLS, 232 Va 94, 348 SE2d 250, 3 VLR 549. Most jurisdictions have similar case law. 17 Am. Jur 2d 130.

III. THE ZLOCK COURT ABUSED ITS

DISCRETION IN DENYING THE MOTION TO EXTEND TIME TO APPEAL

Argument is given on P-77 et seq and will not repeated here.

While the Clerk did not send notice of the judgment to the owner, Bernard J. Dolenz, per FRCP 77(d), Bernard J. Dolenz complied with the efforts outlined in Tessmer v. Walker, 833 F2d 934 (11th Cir. Dec. 1987), and it was an abuse of discretion at the Trial Court to deny his Motion for an Extension of Time to Appeal.

In this regard, Bernard J. Dolenz made repeated inquiries by phone, as well as a couple of visits to review the file, requesting repeatedly of Judge Zloch's clerks and staff to expedite the Motions

before the Court and to keep Bernard J. Dolenz posted. These inquiries were made repeatedly of the Clerk as well as Judge Zloch's secretary. Because of the multiple calls to Ms. Greenberg, she indicated that the Clerk's office would keep me informed.

I was unable to have even a hearing before Judge Zloch even in spite of a Motion For Hearing, even though the Court file reflects that I was the owner of the vessel. I never saw the Judge, and even though repeated requests were made by Motion, he would not grant a hearing, and seemingly conducted this case like a "Star Chamber proceeding", which was obviated in 1215 by the signing of the Magna Carta, which principles of due process have been adopted in Amendments 5 and 14 of the U.S. Constitution.

Bernard J. Dolenz believes that he did everything reasonable under the

circumstances to be kept informed short of groveling and living at the Ft. Lauderdale Federal Courthouse. Bernard J. Dolenz asks of this Court what else he could have done under the circumstances.

Rodgers v. Watt, 722 Fd2 456, (9th Cir. 1983), holds that Rule 60(b) should be liberally construed, and that the provisions of the Rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the "incessant command of the Court's conscience that justice be done in light of ALL the facts". Banker's Mortgage Co. v. United States, 428 F 2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 783 (1970) (emphasis in original).

This Court should consider ALL the facts and in particular, consideration that the Trial Court had no business with

this case in the first place as it lacked jurisdiction, and also because the Trial Court would not even consider the rights of the owner, Bernard J. Dolenz, to the vessel, and would not grant a hearing for its defense, violating due process considerations.

In this regard, "Opportunity for a hearing required by due process must be given before the deprivation of a property interest except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event". U.S.C.S. Const. Amend. 14, Burnley v. Thompson, 524 F2d 1233.

"Right to a hearing embraces an adequate opportunity to defend". Christhilf v. Annapolis Emergency Hospital Ass'n, Inc. 496 F2d 174, appeal after remand 552 F2d 1070.

owner should be permitted to have a counter-claim for these damages.

The Plaintiff also exhibited misconduct by not sending documents, as they had done in the past, regarding the MOTION FOR AN AWARD OF COSTS filed March 4, 1988, and giving any notice of the final judgment. The Clerk of the Court at no time sent any notice to me of the final judgment.

Additionally, the owner contends that the judgment is void as this Court does not have jurisdiction over the "vessel" as it has never been finished or commissioned according to statements appended hereto given by Greg Burdick, the U.S. Marshall who arrested the vessel, and marine surveyor Ray Seese.

Bernard Dolenz, as owner, was unable to defend the Defendant due to forcible obstacles from the Court as it would not grant a hearing, even though requested, and would not return the

ruling from that Court.

PRAYER

Petitioner prays of this Honorable United States Supreme Court that:

1. A Writ of Mandamus or a Writ of Prohibition be issued by this Court directed to the Honorable William J. Zloch to dismiss the case as the Court lacks jurisdiction;

2. The 11th Circuit ruling on the Motion for Re-Hearing on Petition for Writ of Prohibition and/or Writ of Mandamus be corrected affirmatively for the owner of the Defendant vessel;

3. The Defendant vessel be released to the Petitioner without impediment for its placement into the water;

4. Alternatively, for immediately release of the vessel pending appeals before this Court;

5. For Rule 11 sanctions against the Plaintiff;

6. For General Relief.

Respectfully submitted,

Bernard Dolenz

CERTIFICATE OF SERVICE

Three copies of the foregoing instrument were sent by regular mail to Judge William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd., Fort Lauderdale, FL 33301 and to Steven Perry, Plaintiff's Attorney, P. O. Drawer 24, Stuart, FL 33497-0024 on this the ___th day of February, 1988.

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PUBLISHER'S NOTE:

The following pages are unavailable for filming:

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(DOCKET SHEET)

DATE	/DOC.#/	PLEADING
1987		
Feb 3		
	27 /19/	MOT. to widraw as counsel for Def.
	27 /20/	MOT. to cont. by Deft.
Mar 12	/21/	ORDER (WJZ-3-12-87) m/to/w/draw as counsel (dkt #19) is DENIED, m/to cont (dkt #20) is DENIED (EOD3-13-87)
	13 /22/	NOTICE of trial conflict by deft.
	16 /23/	MINUTES 3-16-87 hrg on 1st day of trial - trial concluded
Mar 19	/24/	ORDER (WJZ-3-19-87) m/to w/draw as counsel is GRANTED (EOD3-20-87)
	20 /25/	NOTICE of m/for intervention, rule 24(a)., by intervening pltf
	20 /26/	COMPLAINT in personam against Boatyard for negligent performance of repairs; wrongful arrest, by intervening pltf.
	20 /27/	MOTION to dismiss & MOTION to reconsider., by intervening pltf.
	20 /28/	BRIEF in supp of DOC #27

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA - ADMIRALTY DIVISION

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS. NO.
8668384-CIV-Zloch

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

NOTICE OF MOTION FOR INTERVENTION,

Rule24(a)

TO THE HONORABLE JUDGE OF SAID COURT:

PLEASE TAKE NOTICE, that upon the attached affidavit of Bernard Dolenz, verified March 18, 1987, and upon the annexed proposed complaint, the undersigned moves this court to set a date so Intervenor/attorney can be heard for an order permitting Bernard Dolenz to intervene as a plaintiff in this action in order to assert his claim against the defendant vessel, ARIES STAR

TREK, set forth in the proposed complaint annexed hereto, pursuant to the provisions of Rule 24(a) of the Federal Rules of Civil Procedure, on the ground that the proposed intervening plaintiff claims an interest in the defendant vessel, ARIES STAR TREK, and its proceeds and the disposition of this action might impair or impede said proposed intervening plaintiff's ability to protect his interest.

CERTIFICATE OF SERVICE

Copies of the foregoing instruments have been sent by regular mail to:

Stephen Perry, Attorney
555 Colorado avenue, suite 1
P.O. Box 24
Stewart, Florida 33495-0024

Lyman Reynolds, Attorney
P.O. Box 709
West Palm Beach, Florida 33402

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORID

ADMIRALTY DIVISION

CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

Defendant.

_____/

BRIEF TO SUPPORT THE MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT LACKS JURISDICTION

The Plaintiff assumes that jurisdiction exists choosing for his own reason to have this case decided by an admiralty court hoping that the jurisdictional point may be easily over-looked by the Court when it is dealing with the contract having a nautical favor.

An inspection of the Plaintiff's documents confirm that exploratory carpentry, design and engineering, keel fabrication, design engineering and consultation, placing in a stearing system, and alterations to the vessel all relate to the original construction of the vessel. EXHIBIT "A"

This contract, being one for services of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1). In Bond v. F/V Mermaid (1970, DC Fla) 311 F. Supp 1013, a naval architect filed a complaint in rem against a vessel for alterations and additions to its plans ordered by the owners of the Defendant vessel, asserting admiralty jurisdiction, but the Court found that the extra work performed, that is, drafting, conferences, calculations, and the like, all related to the original construction of the vessel, and that

services furnished under the later agreement for changes were supplied in contemplation of completing the original undertaking for the design and supervision of the vessel's construction. This contract, being one for services furnished in the construction of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1), the Court concluded.

The Plaintiff's own invoices and statements indicate that Mr. Burdick knew that the boat was "only about 70% completed". EXHIBIT "B". In EXHIBIT "B", Burdick indicates that he is in the process of re-designing the unfinished boat. the bottom-side still required interior finishing, installation of wiring, plumbing, steering mechanisms, engine fittings, desk fittings, masts and riggings. The boat was never

completed because of lack of funds to complete her by the previous owners.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal (Flota Maritima Browning de Cuba, Sociadad Anonima v. Snobl (1966, CA4 Md) 363 F2d 733, cert den 385 US 837, 17L Ed 2d 71, 87 S Ct 82), and when raised must be examined and decided (Armstrong Cork Co. v. Farrell Line, Inc. (1948, DC Pa) 81 F Supp 848). Or the court itself may raise the issue, and, consequently, Plaintiff's counsel must be prepared to demonstrate admiralty jurisdiction to a court's satisfaction, and his failure to cary this burden when called upon by the Court, even though Defendants counsel also argues to the Court that there is no problem as to jurisdiction, will result in dismissal (Rhederei Actien

Gesellschaft Oceana v. Clutha Shipping Co. (1915, DC Md 226 F 339).

Agreements for alterations and additions to plans ordered by the owners are not maritime contracts and, hence, not within the purview of admiralty jurisdiction. This holding has been repeated many times by decisions of the United States Supreme Court beginning in 1857 with People's Perry Co. v. Beers (1857) 61 US 393, 15 L Ed 961. People's Ferry held that District Courts of the United States had no jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends, pointing out that liens on vessels encumber commerce.

The Court said that it would be a strange doctrine to hold the ship bound in a case where the owner made the

contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a seagoing ship, and that as to the contract being purely maritime and touching rights and duties appertaining to navigation, it was a contract made on land, to be performed on land, the wages of the shipwrights having no reference to a voyage to be performed, so that they were bound to rely on their contract.

In Thames Towboat C. v. The Schooner "Francis McDonald" (1920) 254 US 242, 65 L Ed 245, 41 S C t 65, the United States Supreme Court held that the Plaintiff's contract to furnish materials, work, and labor for her completion made after the schooner was launched BUT WHILE NOT SUFFICIENTLY ADVANCED TO DISCHARGE THE FUNCTIONS FOR WHICH SHE WAS INTENDED, was not within the admiralty and maritime jurisdiction. (Emp. added).

THE DEFENDANT "ARIES STAR TREK" IS NOT A VESSEL

"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Act of July 18, 18966 Ch 201 Section 1, 14 Stat 178, incorporated into the Revised Statutes as Section 3.

The "Aries Star Trek" has never been seaworthy, and has never been capable of being used as a means of transportation on water. Basically, this is why the "Aries Star Trek" was placed in the Plaintiff's hands so that she could become seaworthy. The Defendant never had a crew or machinery in operation that would make it navigable.

ALTERNATIVELY, DEFENDANT "ARIES STAR TREK" WAS A "DEAD SHIP".

Assuming that the Plaintiff contends that the Defendant "Aries Star Trek" was launched, which is denied by the Defendant, it should be clear that the "dead ship" doctrine would apply as the Defendant was withdrawn from any maritime activity or navigation and therefore would not fall within the admiralty jurisdiction. "A ship is made to plough the seas, and not to lie at the walls." The Poznan (1925, CA2 NY) 9 F 2d 838, revd on other grounds New York Dock Co. v. The Poznan, 274, US 117, 71 L Ed 955, 47 S Ct. 482.

In Nanna v. The Meteor (1950, DC NY) 92 F. Supp 530, affd (CA2) 184 F2d 439, cert den 349 US 933, 95 L Ed 673, 71 S Ct 497, the Meteor had been part of a reserve fleet which was purchased by the Plaintiff from the US Maritime

Commission. The boat's Coast Guard Certificate of Inspection had expired, as had her Certificate of Enrollment and license with the Bureau of Customs. The vessel was towed to New York where painting services were performed, and during that period it had no crew, light, heat, or power, and no machinery in operation. The Court found that in order for the Meteor to have been returned in navigation and commerce, there would have been required very extensive repairs AND PROPER DOCUMENTATION, and concluded that the Meteor was a "dead" ship.

This is analagous to the Defendant "Aries Star Trek" as it needs extensive work before it can even be seaworthy, and will require proper documentation before it can be returned for navigation and commerce.

The "dead ship" doctrine was considered in Hercules Co. v. The Brigadier General

Absolom Baird (1954, CA3 NJ) 214 F2d 66, where the District Court found as fact that at the time of labor and services for which a maritime lien was sought, the vessel "was not in commission and she was unable to sail, " and concluded that no maritime lien arose under 46 USC Section 971.

The Defendant is not in commission and is not able to sail as the top-side has never been out-fitted with masts and rigging.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant prays of the Court to dismiss this action as it lacks jurisdiction, there was no maritime contract the Defendant "Aries Star Trek" is not a vessel as defined in Admiralty Law; and alternatively, that the Defendant is a "dead ship", and for Rule 11 Sanctions

against the Plaintiff as the Court may deem proper for the vexatious and frivolous lawsuit brought into this Court without jurisdiction; and for costs of Court and attorney fees expended in defending this case; and for general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

On the 4th day of April, a copy of the foregoing instrument and Claim of Bernard J. Dolenz was sent by regular mail to Steven Perry, P.O. Drawer 24, Stuart, FL 33495-0024.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORID

ADMIRALTY DIVISION

CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

Defendant.

_____/

MOTION TO VACATE JUDGMENT
MOTION TO VACATE PLAINTIFF'S MOTION FOR AN AWARD OF COSTS &
MOTION FOR MODIFICATION OF THE ORDER APPOINTING SUBSTITUTE CUSTODIAN & ORDER

Defendant moves the Court to vacate and set aside the final Judgment entered against Defendant in this cause on February 16, 1988, and to grant leave to Defendant to defend itself through its owner, Bernard J. Dolenz, and to allow the filing of the counter-claim for damages against the Plaintiff or his

breach of bailment, on the grounds as more fully appears from the affidavit of Bernard J. Dolenz, attached as Exhibit "A", and the memorandum of law attached. Defendant also moves the Court to vacate and set aside its order granting the Motion for Modification of the Order Appointing Substitute Custodian and to Deny the Motion for an Award of Costs on the grounds as more fully appears from the affidavit of Bernard Dolenz, attached hereto as Exhibit "A" and the annexed Memorandum of Law.

Dated: 04/09/88

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail to Steven Perry, P.O.

Drawer 24, Stuart, FL 33495-0024 on this 11th day of April, 1988.

_____.
Bernard J. Dolenz

AFFIDAVIT

State of Texas

County of Dallas

Bernard J. Dolenz, being duly sworn, deposes and says:

My name is Bernard J. Dolenz. I am over 21 years of age, have never been convicted of any felony, and am competent to make this statement.

I am the owner of the Defendant "vessel" Aries Star Trek, and the Claim of Bernard J. Dolenz was filed April 6, 1987 in this Court. While there was an oral agreement for an assignment of all the rights of the defendant "vessel" March 15, 1987, the written assignment was not received by me until on or about March 26, 1987 in Dallas, Texas. From the time of March 15 to when I received the written assignment, I viewed Melissa Keyes as having equitable title to the "vessel", and Mr. Lyman Reynolds was an

attorney representing the interests of the Aries Star Trek.

Mr. Reynolds tried to abandon Melissa Keyes when he heard that the Plaintiff's owner, Greg Burdick, was threatened and placed a "withdrawal" motion before the Court, which the Court denied, shortly before trial.

I learned that the Court denied Mr. Reynold's Motion For Continuance March 16, 1988 and that the case was going to trial. I tried to reach the Court several times that morning because I needed to explain, and wanted to explain to the Court that I did not have any writing reflecting my ownership interest, and that Mr. Reynolds should try his best to represent the Aires Star Trek. The Court refused to accept my several phone calls, or to even call me back. Furthermore, to this date I have never met the Judge involved in this case, and have been denied hearings

before this Court, even though requested.

Additionally, I had a phone call in for Mr. Reynolds, but he did not return my calls to explain that Melissa Keyes still had equitable title to the "vessel" as I had never received the assignment. Melissa Keyes says Mr. Reynolds abandoned her during the trial process. This placed the Defendant "vessel" in a default posture, which was suprising, since the Court would not allow a continuance.

Melissa Keyes is not an attorney, and could not be in a position to understand the legal impact of her attorney abandoning her at trial time.

The Plaintiff's attorney, Mr. Perry, indicated to the Court that "Ms. Keyes obviously no longer has standing before this Court" on P. 13 of the Trial Transcript. The Court on P. 17 of the Transcript states "...Mr. Dolenz had

sufficient time to have made contact with the Court's chambers and there has been no such contact..." This is not correct as I tried on several occasions to reach the Judge of this Court to obviate the very problems that has so much turmoil. Ms. Keyes represented to the Court that I was the owner. Even though there have been numerous papers filed with the Court reflecting my involvement with this case, and with Mr. Perry sending me copies of documents, I have been the Real party in interest and owner of the Defendant "vessel", and have filed my claim of ownership, which has never been controverted.

Mr. Perry has not sent me notices of his Motion for Modification of the Order Appointing Substitute Custodian and no one, including the Clerk, has ever sent me a copy of the Final Judgment filed February 16, 1988. I

learned about it from "Cathy" who informed me of same April 6, 1988.

During this entire case, as the owner of the "vessel" it is my contention that I have been deprived of due process as the Final Judgment allows for the sale of my "vessel" without my ever being able to defend it. This has deprived me of my property without due process of law, and seems abhorrent to any system of justice.

The owner has meritorious defense as the boat was never commissioned or finished, according to Ray Seese, Plaintiff's marine surveyor. Mr. Burdick said that the boat was only 70% complete, and is so quoted in a newspaper article which is attached. The return from the U.S. Marshall, following the arrest, also states that the "vessel" was not complete. The attached documents in support of these statements are true and correct copies.

The owner has a meritorious claim as neither Greg Burdick nor any representative of the Plaintiff had any documents in the Court's file to show compliance with the Court's order filed July 3, 1986 that "the Plaintiff shall file with the Court on a monthly basis a statement of condition of the vessel". When I visited with Mr. Burdick and saw the "vessel" for the second time, it had deteriorated under his care as the starboard side, facing the sun, had board warpage with cracks between the planks, which it did not have upon my first inspection. Mr. Burdick also said that he had not started the diesel engines, which need to be run every couple of weeks to keep the motor seals from deteriorating. In this regard, I believe that Mr. Burdick breached his bailment responsibilities as bailee, and custodian of the vessel, and that the

IV.THE ZLOCK COURT ABUSES ITS DISCRETION IN NOT RELEASING THE DEFENDANT AIRES STAR TREK AS FUNDS HAVE BEEN TENDERED TO THE COURT FOR ITS RELEASE.

Two motions are before this Court for the release of the defendant. One sent June 30, 1988, and the second September 27, 1988. The Court has been tendered $44,995.78 dated 6/30/88 and has possession of the check. In spite of authority of Rule E, 4(f) for the release from arrest, the Court refuses to release the boat or give a ruling on why not. The 11th Circuit has had a FRAP 8 Motion sent July 14, 1988 because of the insensitivity of the Zlock Court, and likewise there has been no reponse or

phone calls on March 16, 1987 to Bernard Dolenz, when the Court allowed Melissa Keyes to be without counsel, would not continue the case, and placed the defendant vessel in a default posture.

It is the owner's contention that the Court should allow, under these circumstances, the vacation of the judgment in the furtherance of justice, as the Judgment is manifestly unjust. the vacation of the Judgment should be allowable, pursuant to Rule 60 (b)(1)(3)(4)(6).

_____

Bernard J. Dolenz

Subscribed to and sworn to before me on this 9th day of April, 1988.

_____

Brenda J. Dolenz
Notary Public in and for
The State of Texas

My commission expires
12/06/89

[See page 10 for U.S. Marshall remarks upon arrest]
[See page 43 for Marine surveyor portions]
[See page 44 for statements heard by owner of Stuart Y

MEMORANDUM OF LAW

ISSUE OF ASSIGNMENT

On March 16, 1987, when the Court forced the case to trial and allowed Lyman Reynolds to withdraw, the transfer of title from Melissa Keyes to Bernard J. Dolenz, pursuant to assignment, had not taken place because delivery of the assignment did not occur until on or about March 26, 1987. The delivery was made in Dallas, Texas.

"Where the assignment is by a written instrument, simply signing or acknowledging the instrument is not sufficient to transfer the property, and delivery of the instrument is necessary to complete the assignment". Heyman v. Kline, D.C. Conn., 344 F. Supp. 1088, affirmed in part and reversed in part on other grounds, C.A., 456 F.2d 123, certiorari denied 93 S.Ct. 53, 409 U.S. 847, 34 L. Ed. 2d 88.

"As a general rule, in every transfer of title from one person to another, there must be an actual or constructive delivery of the thing, or paper title thereto, with intention to

pass title, and an actual or constructive acceptance, so as to end dominion on the one side an create it on the other'. 6 Am Jur 2d, 274, Section 91 dealing with Delivery.

The general rule is that in order to make an assignment effective, there must be in addition to a delivery of the thing assigned, an actual or constructive acceptance thereof by the assignee". 6 Am Jur 2d, 276, Section 93 dealing with Acceptance by assignee.

Texas law should apply to the assignment inasmuch as delivery was made in Texas.

OWNERSHIP OF DEFENDANT VESSEL

When Bernard Dolenz received the assignment in Texas, on or about March 26, 1987, title then passed to him and he should be able to sue in his capacity as the owner, or defend in his capacity as the owner.

"An assignee may sue in his own name and even for future interests. A right or interest to be assignable at common law, must have either an actual or potential existence. A thing has potential existence if it may actually exist at some future time". 7 Tex. Jur 3rd 186-187.

PROPERTY SUBJECT TO JURISDICTION

The Defendant vessel was never launched, but even if she was, she was not sufficiently advanced, she was not yet sufficiently advanced to discharge the functions for which she was designed, and the Melissa Keyes contract was to make changes in the original design, and have materials and labor furnished to that effect. Therefore, this Defendant vessel should not have been sued in Admiralty.

"...a vessel in the process of construction will become a vessel in terms of Admiralty jurisdiction only after its launching". 2 Am Jur 2d 73, Section 30 dealing with Admiralty.

"Even after the vessel was launched while she is not yet sufficiently advanced to discharge the functions for which she is designed, the materials, work and labor for her completion are not the subject matter of admiralty

jurisdiction". Thames Towboat Co. v. The Francis McDonald, (1920) 254 U.S. 242, 65 L.ed. 245, 41 sup. Ct. Rep. 65.

Supplying materials for construction of a vessel is not a maritime contract. People's Ferry Co. v. Beers, (1857) 61 U.S. (20 How.) 393, 15 L.ed, 961.

"A vessel is deemed to be still in the process of construction if it is not yet completed for the intended purpose, though it may have been launched". 2 Am Jur 2d, 756, Section 65 dealing with construction of vessels.

Proceedings in rem allow the owner to defend it against claims.

"Although technically, in a proceeding in rem, the res, not its owner, is the party defendant, such a proceeding nevertheless incidentally affects the persons interested in the, res, and they are entitled to defend it against the claim. Accordingly, it has been said that in a proceeding in rem, by virtue of dominion over the thing, persons interested in it are deemed to be parties to the suit". 2 Am Jur 2d 807, Section 144 dealing with Proceedings in rem.

THE MOTION FOR AN AWARD OF COSTS BY PLAINTIFF IS INAPPROPRIATE

The defendant failed to send notice regarding the Motion, and even if he had, he waived his claim to it, as the plaintiff, in accepting the appointment as a substitute custodian for the vessel, accepted the condition under 2a of the Court Order, filed July 3, 1986 that the "Plaintiff shall not be entitled to charge for storage as substitute custodian". Also, in the same order, under 2, the Plaintiff was obliged to file with the Court on a monthly basis a statement of condition of the vessel. No such instruments are shown to be filed in the Court record. By waiver and laches, and acceptance of the condition to be a substitute custodian, the Plaintiff should not be awarded costs.

"It must especially determine whether there has been inexcusable delay on the part of the one seeking the remedy and whether substantial prejudices may result to the opposite party, although if the libel shows on its face that it may be barred by laches

because of undue delay in instituting it, prejudice to the respondent is presumed until the contrary is made to appear". 2 Am Jur 2d, 834, Section 190 dealing with Laches.

RAISING LACK OF JURISDICTION

"Jurisdictional objections may be raised at any stage of the proceeding before final adjudication, and may be raised for the first time on appeal". 2 Am Jur 2d, 842, Section 202.

The record is repleat with cases showing that the Court lacks jurisdiction because the boat has not been finished, and the cites will not be repeated.

DUE PROCESS NOT ALLOWED

TO BERNARD DOLENZ

Bernard Dolenz, as owner, has been deprived of due process, as he has not had a hearing or been given an opportunity to defend the vessel, even if the Court had jurisdiction.

"One incident of constitutional protection against state deprivation of a property interest is that, at some point, notice and a hearing appropriate to the particular circumstances must be afforded". Collins v. Wolfson, 498, F2d 1100.

"Opportunity for a hearing required by due process must be given before the deprivation of a properly interest except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event". U.S.C.S. Const. Amend. 14, Burnley v. Thompson, 524 F2d 1233.

"Right to a hearing embraces an adequate opportunity to defend". Christhilf v. Annapolis Emergency Hospital Ass'n, Inc. 496 F2d 174, appeal after remand 552 F2d 1070.

MOTION TO VACATE JUDGMENT

SHOULD BE ALLOWED

The Courts should and do give a liberal construction to 60(b). Klapprott v. United States (1949) 335 US 601, 609, 69 S.Ct. 384, 387, 93 L ed 266. Each order or judgment shall be noticed by the clerk upon each party. Rule 77(d). Here the Final Judgment and the Order allowing the Motion For Modification of the Order Appointing Substitue Custodian were not sent to the owner, Bernard J. Dolenz. Also the Plaintiff did not send its Motion for

Modification of the Order Appointing Substitute Custodian or its Motion For Award of Costs, and there is no Certificate of Service to the owner, Bernard Dolenz, as is required.

Therefore, all these should be voided.

The owner, since he did not receive notice, did not have the opportunity to defend the claims against the defendant "vessel", has a meritorious defense, and has not received notices from the clerk regarding the final judgment or copies of the motions from the Plaintiff, rule 61(b)(1) comes into play because of mistake, inadvertence, surprise, or "excusable neglect". Foley v. United States, 645 F.2d 155 (2d Circuit - 1981). United Coin Meter Co. v. Seaboard Coastline R.R., 705 F 2d 839 (6th Circuit - 1983); Davis v. Musler, 713 F2d 907 (2d Circuit - 1983).

Lyman Reynolds was hired to defend the vessel by Melissa Keyes, and should not have been allowed to abandon defending the vessel, certainly while Melissa Keyes had equitable title. Dolenz was led to believe that Lyman Reynolds would defend the vessel until such time as he received the assignment to pass title. From a default judgment where individual defendant erroneously believed corporate defendant's counsel would represent him, relief was granted in Tickerton v. Record Museu, Inc., 92 F.R.D. 6 (E.D. Pa. 1981).

Rule 60(b)(3) comes into play because of the misconduct of the Plaintiff, wherein several motions have not been sent the real party in interest, the owner Bernard Dolenz as required. This deliberate withholding of relevant documents has prevented the owner from fully and fairly presenting his defense. See U.S. v. Undetermined

Quantity, 583 F2d 942 (7th Cir. 1978) and Wilkin v. Sunbeam Corp., 466 F2d 614 (10th Cir. 1972).

Rule 60(b)(4) comes into play as a party is allowed relief from a void judgment because of lack of jurisdiction. Such a judgment is legally ineffective, or as sometimes stated, a nullity. Willams v. North Carolina 325 U.S. 226 (1945); Kalb v. Feurestein, 308 U.S. 433 (1940); Jordon v. Gilligan, 50 F2d 701 (6th Cir. 1974), cert. denied, 241 U.S. 991 (1975).

"Traditionally, a void judgment could be set aside at any time." See 1 Freeman, JUDGMENTS, Section 322. Today, because they are viewed as a legal nullities from their inception, void judgments may still be vacated at any time by the courts which rendered them. See Misco Leasing, Inc. v. Vaughn, 450 F2d 257 (10th Cir. 1971) where a default judgment entered without personal

jurisdiction vacated after a period of over two years; and Crosby v. Bradstreet Co., 312 F2d 483 (2nd Cir. 1963) where relief from an invalid injunction granted after 29 years.

Rule 60(b)(6) liberally applies to situations not covered by the other 5 clauses. The district court has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice. See Good Luck Nursing Home Inc. v. Harris, 636 F2d 572 (D.C. Cir. 1980).

The Court should allow Dolenz as owner an opportunity to defend the vessel, as the Court has evidence of his ownership because of statements given by Melissa Keyes in the Trial Transcript that all rights to the vessel were granted to Bernard Dolenz; Dolenz had his statement of claim before the Court

April 6, 1987; and the assignment from Melissa Keyes to Bernard Dolenz delivered on or about March 26, in Dallas, Texas to Bernard Dolenz. What further proof or notice could the Plaintiff or the Court require?

Accordingly, Bernard Dolenz requests that the judgment be vacated and that he be allowed to defend the vessel in the interest of justice.